PROCEEDINGS

OF THE

American Society of International Law

AT ITS

THIRTIETH ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

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Saturday, April 25, 1936, 10 o'clock a. m.

ANNUAL BANQUET

Saturday, April 25, 1936, 8 o'clock p. m.

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CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW[1]

(Revision of April 25, 1925.)

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation

[1] The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting on p. 23. The Constitution was adopted January 12, 1906.

of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

Article IV

Officers

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Secretary,[1] and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reëlection until the next annual meeting after that at which his term of office expires.

The Secretary [1] and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

Article V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretary [1] shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him.

[1] As amended April 26, 1930.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

Article VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

Article VII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members,

be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

Article VIII

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Secretary [1] within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

[1] As amended April 26, 1930.

REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

Adopted May 22, 1924

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall be elected annually by the Executive Council.[1]

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board. The minimum number of contributions which each Editor shall be called upon to contribute or obtain for publication in the *Journal* is to be determined by the Board.[2]

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

[1] As amended April 24, 1926, and April 25, 1929. [2] As amended April 25, 1929.

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

THIRTIETH ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

THE CARLTON HOTEL, WASHINGTON, D. C.

FIRST SESSION

Thursday, April 23, 1936, at 8 o'clock p.m.

In the absence of the President, the meeting was called to order by Mr. CHARLES HENRY BUTLER, Chairman of the Executive Council.

Mr. BUTLER. For the first time since the organization of the Society our President, Dr. James Brown Scott, is not with us. He is absent, attending the meeting of the Institute of International Law in Brussels.

Therefore it devolves upon the Executive Council to select one of the Vice Presidents to preside at this meeting. There are fifteen Vice Presidents and, by a process of elimination of those who could not make speeches because they were away, those who would not make speeches if they were here, and those who could not make them anyway, we decided upon one who will be the star presiding officer. Professor George Grafton Wilson, of Harvard University, will preside at this meeting as Vice President and President *pro tem.*

(Professor George Grafton Wilson took the chair.)

Chairman WILSON. I understand the Secretary has some announcements which he wishes to make.

Secretary GEORGE A. FINCH. First of all I wish to present a cablegram of greetings from Dr. Scott, from Brussels, received today, in which he sends his best wishes.

I also have a message from Professor Manley O. Hudson, who is likewise abroad, regretting his absence and sending his love to the Society.

Next I should like to read the following telegram from President Bessie C. Randolph, of Hollins College, who has been a regular attendant at our meetings, in which she says:

> Warmest greetings to the Executive Council as it meets today. May Council meetings and the general assembly of the Society this year be full of inspiration and wisdom at such a time as this. Affectionately always.

I also have a letter from Mr. Jackson H. Ralston, one of our honored Vice Presidents on the Pacific Coast, regretting his inability to be here.

At this time I wish to offer for adoption by the Society two telegrams which the Executive Council has authorized me to present. One is addressed to Dr. Scott at Brussels, and is as follows:

> American Society International Law at thirtieth annual meeting sends you greetings and best wishes for success fortieth session Institute International Law.

(The sending of the telegram was moved, seconded, and the motion adopted.)

Chairman WILSON. The motion prevails. The cablegram will be dispatched.

Secretary FINCH. I will then offer the motion, with the permission of the Executive Council, that the following telegram be addressed to Honorable Elihu Root, who was the first President of this Society and was our President for seventeen years and who, as you all know, has now passed his 91st birthday and is still very much interested in our work. The telegram reads as follows:

> Greetings and best wishes from thirtieth annual meeting American Society International Law to its beloved first President who wisely guided it in its infancy and encouraged it in its youth.

(The adoption of the resolution was moved, seconded and carried.)

Chairman WILSON. The motion prevails. The telegram will be sent to Mr. Root.

Secretary FINCH. The cablegram and telegram will go off immediately.

Now, Mr. Chairman, before you begin in earnest your arduous duties of presiding at this meeting I should like to present a request from Dr. Scott, which has been approved by the Executive Council, that a paper he would have read had he been here to preside, be read by title and included in the printed proceedings of the meeting. The title is: "What Does International Law Mean To Us?"

Chairman WILSON. You have heard the recommendation of the Executive Council. All in favor of its adoption will signify by saying aye; those opposed by saying no. (After a pause.) The motion prevails. This address will be printed in the proceedings.

WHAT DOES INTERNATIONAL LAW MEAN TO US?

By JAMES BROWN SCOTT

President of the Society

(Read by title, in the absence of Dr. Scott)

What does international law mean to us Americans? In the past it meant largely, if not entirely, a law of war. Today it means, we believe, the law of peace—peace within, peace without; peace between all enlightened nations and the spiritual exaltation of the world through the administration of justice.

But as international law is the law governing the relations of the States and, through the States, of their various peoples, we must have a proper understanding of the State in order that we may have an understanding of the law of nations, for law would be a meaningless thing if we did not know to

what it applied. Now the States of the Americas—North, Central and South—are the creation of their respective peoples. We shall not here speak of the States of antiquity because, if we did, we would be lost in the mazes of history; but of the creation of the American States there can not be any doubt. We even know when and why our American world was discovered; we know how it was settled; and we know how the people of the various settlements, colonies or provinces became States and how the government of each and every State was formed. For present purposes, however, we limit ourselves to what is somewhat scornfully called the "Colossus of the North."

Previous to the year 1776—which we believe is an outstanding date in the world's history—there were thirteen English colonies lying to the south of Canada, each separate and distinct and independent of the other, but each dependent upon the Crown of Great Britain. These colonies were settled by peoples of the Old World: overwhelmingly from England, Scotland and Ireland, by Netherlanders in New York and Germans in Pennsylvania, with a sprinkling of French in the Carolinas and here and there a dash of Welsh. Each of the thirteen colonies had a charter from the Crown, defining rights and prescribing duties. Now it happened that the colonies became dissatisfied with the Crown because of its persistent attempt to govern them in an arbitrary manner, instead of allowing the colonies to govern themselves in accordance, as they believed, with the terms of their respective charters. Therefore, on the 4th day of July, 1776, the colonies declared themselves independent of the mother country.

In their Declaration they set forth the reasons which "impelled" them to this separation; and, in so doing, they laid the foundations of what we believe is—or should be—the modern State. In the first place, the erstwhile colonies stated their inherent right to set up governments for themselves and to assume the rights and duties of independent States "under the Laws of Nature and of Nature's God." It is to be observed that in this, their first official act, they recognized implicitly, if not expressly, the existence of the law of nations and acted under what they conceived to be the precepts of the law of nature. Not content, however, with this general statement, the framers of the Declaration went into details, asserting that all men were created equal; and, without specifying all the rights which they could claim, they enumerated the inalienable rights of "Life, Liberty and the pursuit of Happiness," maintaining in the same connection that governments were established for safeguarding these rights and that when the form of government fell short of the purpose for which it was established, the people were possessed of the right to replace it by a government better calculated, in their opinion, to preserve their inalienable rights. Here we have government by the consent of the governed, the government being the agency of the people forming it and the so-called officials the agents of that agency for carrying into effect the will of the people expressed in terms of law and government.

The State then is nothing but an agency of the people, and the chosen

agents exercise their functions, administering the law of the State within its territorial boundaries. So much for the law within the State. But what of the law beyond and between States? The signers of the Declaration had such a law in mind and therefore declared that the colonies were free and independent of Great Britain and that "as Free and Independent States" they were possessed of "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

There was here, however, a fundamental reservation. Though free and independent, they could do only what they had a "right" to do. What is the meaning of this reservation? Clearly that the United States could do only what they had a right to do in accordance with international law. And this self-imposed limitation is the glory of the founders of the Republic and its observance a point of honor with their successors.

As a people we believe—without arrogance, we hope—that our conception of the State is correct, even though it may differ from the conception of our European friends. And what is our conception? A union of equal States, with equal rights: a government by the consent of the people, the government being their agency and its so-called officials merely agents to carry out the powers expressly or impliedly conferred upon the government, not in behalf of the agent nor of the agency, but in behalf of the people, who are the source of power and who alone suffer because of its abuse.

What then should be the relationship of the union which we call the United States with the nations of the world? It should be a relationship based on law, not the law of any one State but the law of nations or international law.

Let us pass from these general observations to specific examples.

While the American Revolution was in progress, Benjamin Franklin, then our representative in Paris, and still recognized as our greatest diplomat, laid down in a few words the basis of what we believe should be our foreign policy, —"the Discovery of a Plan, that would induce & oblige Nations to settle their Disputes without first Cutting one another's Throats." And we can not refrain from reëchoing the good Doctor's immediately following exclamation: [1] "When will human Reason be sufficiently improv'd to see the Advantage of this!"

Dr. Franklin believed that the war with Great Britain was a just war —and indeed peoples at war generally believe that the cause of their country is just, especially after a resort to arms. Thus Great Britain also believed that its armed resistance to the claims of the Americans was just. At the present day, however, our British friends agree with Franklin, as does all the world. That being so, his statement in behalf of peaceful settlement has all the greater weight. He recognized that a resort to force might be justi-

[1] The Writings of Benjamin Franklin, edited by Albert Henry Smith (New York, 1907), Vol. VIII, p. 9.

fiable as being then the only means at the disposal of the colonies in order to separate from Great Britain and preserve their inalienable rights; but when the States had acquired their independence and formed a nation, the disputes of the future, he hoped, would be settled peacefully, "without first cutting one another's throats."

Now this was in 1780, when Washington was at the head of a struggling army. But after the independence of the American States had been achieved and they had created a government of their own choice, and when the Constitution of the United States had been framed in 1787 and the Government of the United States organized in accordance with its provisions, Washington, who had been Commander in Chief of the American forces, had the presidency forced upon him by a grateful people. Within the first year of his presidency he gave specific effect to the hope expressed in Franklin's letter in behalf of peaceful settlement.

It is true that the people of the United States were then at peace with the people of Great Britain and that a treaty recognizing the independence of the erstwhile thirteen colonies had been concluded and ratified by both of the contracting parties. But provisions in a treaty to settle disputes may give rise to disputes as to the meaning of the parties. The treaty of 1783 with Great Britain was no exception, certain provisions giving rise to boundary and other disputes. Now it happened that John Jay, who had been Secretary of Foreign Affairs under the Articles of Confederation, was requested by President Washington to serve as Acting Secretary of State under the new government until Thomas Jefferson, then our Minister to France, should return to the United States and assume the Secretaryship of State, which he had accepted at the instance of Washington. Jay complied and suggested to Washington that the proposal which he himself had made a few years before—to be specific, in 1785—for the settlement of the boundary dispute with Great Britain by arbitration should be renewed. Washington agreed to Jay's suggestion, but his mind was of a larger mould, for, while accepting the suggestion, he enlarged the principle to include the world, as Franklin had hoped might be done, saying in two brief lines of his message to the Senate of February 9, 1790: [2] "In my opinion, it is desirable that all questions between this and other nations be speedily and amicably settled." These two lines are not often quoted, but they are of the utmost importance as showing that the first President of the United States, although he had been a man of arms, was in favor of peaceful settlement. Franklin's hope and Washington's express judgment, enforced as it was by a practical application in Articles V, VI and VII of the Jay Treaty of November 19, 1794, negotiated during his own administration, should be the basis of the foreign policy of the United States.

I would venture therefore to say that the first, and hence fundamental,

[2] James D. Richardson's Messages and Papers of the Presidents, Vol. I (Washington, 1896), p. 72.

principle or foundation-stone of our law of nations should be the settlement of all our disputes, whatever their nature, by peaceful means.

Let us now take the second stone, as it were, in the foundation of our law of nations. Many years after the Revolution and during our war with Mexico, Albert Gallatin, a Swiss by birth and American by choice, a distinguished public servant (Senator, Congressman, Secretary of the Treasury, and Minister Plenipotentiary), after a lifetime of experience in statecraft and with the wisdom of an octogenarian, felt impelled to appeal to the Government of the United States to make peace with Mexico instead of continuing the war, a war which was regarded at the time as sectional instead of national and which we today look upon as unjust. Mr. Gallatin expressed his views in a pamphlet entitled *Peace with Mexico*, in the course of which he made an observation which is as fundamental as that of Franklin: [3] "The true honor and dignity of the nation are inseparable from justice." Now we should ponder well this pronouncement, as profound in meaning as it is noble in sentiment. Mr. Gallatin was only too well aware that in the world of everyday affairs there were two conceptions of honor, the one of the moment, begot of passion, the other the result of thought and reflection. Honor which is not of the moment nor of a day but of the centuries is the spur to right-doing in all relations. Likewise Albert Gallatin's conception of national dignity was not that of power and the station which power is supposed to confer upon a mighty nation. Rather it was of a dignity based upon the sense of self-respect which should prevent the governors of nations from bemeaning themselves and their countries by a settlement of justiciable questions through a resort to war, which in the last analysis is nothing but the exercise of brute force. Again let me say that the little word "true" which precedes "honor" in Mr. Gallatin's pronouncement is to be taken also as preceding "dignity." If we must have an example, we shall find it, as Mr. Gallatin had doubtless found it, in the sense of honor and the conception of dignity of our Washington—indefinable but recognized by every upright and law-abiding countryman of our first President.

Now these terms "honor" and "dignity" as applied to the State should not differ essentially from the same terms as applied to the individual. The standard in each case is identical—the standard of justice. Therefore, to Albert Gallatin, the honor of the high-minded gentleman, the dignity also of the high-minded gentleman, were lofty conceptions fitting and appropriate not only to the enlightened individual but also to the groups of individuals who, taken together, make up this union of States. But we do not need to indulge in subtleties and refinements to determine the sense in which these words should be used, or the standard by which they are to be interpreted and by which they are to be applied. We have this standard on even greater

[3] The Writings of Albert Gallatin, edited by Henry Adams (Philadelphia, 1879), Vol. III, p. 586.

authority than that of Washington and Gallatin—a standard to be found without difficulty in the Golden Rule of the New Testament.

Honor and dignity, then, are the second and third of our foundation-stones.

But there is another stone in the foundation which is, as every such stone must be, of equal value. It was quarried by Abraham Lincoln, who said in the simplest and therefore the most impressive of English: [4] "Let us have faith that right makes might, and in that faith let us to the end dare to do our duty as we understand it." True honor, true dignity, make for right, and fortunately, in the long run, right makes might.

So far only one of the four statements of international policy which we have quoted has been made by a soldier, a soldier albeit of the highest type, in supreme command of the destinies of his people in war; and a statesman whose supreme purpose was to lead and preserve his countrymen in peace.

Let us now invoke another soldier and man of war. In 1879, Ulysses S. Grant was invited to attend a peace meeting in Philadelphia. This he did, addressing the Universal Peace Union the day after Christmas of that year. Now Mr. Grant, although he had been commander of the armies of the United States during the Civil War and subsequently President and Commander in Chief of the Army and Navy of the United States, had nevertheless settled by arbitration the Alabama claims, growing out of differences between the Governments of Great Britain and the United States. Looking into the future, however, he spoke of peace brought about not only by arbitration but by courts of justice. To quote from the account of his address as published in the records of the day: [5]

> Although educated and brought up a soldier, and having probably been in as many battles as anyone, certainly as many as most people could have been, yet there never was a time, or a day, when it was not my desire that some just and fair way should be established for settling difficulties, instead of bringing innocent persons into the conflict, and thus withdrawing from productive labour, able-bodied men who, in a large majority of cases, have no particular interest in the subject for which they are contending.
>
> I look forward for a day when there will be a Court established, that shall be recognised by all nations, which will take into consideration all questions of difference between nations, and settle by arbitration or decision of such Court, those questions, . . .

Here we have the admission of a man whose claim to distinction and whose place in history are due primarily to his military career. It is doubtful that he had in mind the statements from Franklin, Washington and Gallatin which we have quoted or that at the time of his address he recalled Lincoln's

[4] Address delivered at Cooper Institute, New York, February 27, 1860. Abraham Lincoln, Complete Works, edited by John G. Nicolay and John Hay (New York, 1894), Vol. I, pp. 599, 613.

[5] The Herald of Peace, March 1st, 1880, No. CCCLVII, New Series, p. 35.

admirable phrase. Yet whether he knew or not that the views which he was expressing were bolstered up by the views of others, they were the dictates of a large and generous heart. Thus by his pronouncement General Grant laid the fifth stone in our foundation,—adding judicial settlement to arbitration.

We now come to the sixth stone in our foundation, laid by none other than Grover Cleveland, President of the United States from 1885 to 1889, who, reëlected in 1892 for a second term, found, when he took the oath of office after the intervening administration of President Harrison, a complicated and unfortunate situation in the Pacific. This incident in our history is so fundamental to American foreign policy and the American conception of international law that it can not be too often dwelt upon and pondered. We are inclined to forget too easily our own failings and the lofty standards by which they were corrected. The administration preceding that of President Cleveland had negotiated a treaty with a "revolutionary" government in Hawaii, composed of persons of American descent (when not of American birth), who had overthrown the legitimate government under Queen Liliuokalani. This treaty, by which Hawaii was to be annexed by the Government of the United States, had not been ratified at the time when President Cleveland took the oath of office for the second time, in 1893. Because of his insistence on good faith in international relations, he was deeply interested in the Hawaiian question. Therefore he requested the Senate Committee on Foreign Relations, to whom his predecessor had sent the treaty, to return it to the White House. This was done.

President Cleveland thereupon sent a special commissioner to the Hawaiian Islands to ascertain the facts regarding the so-called revolution. The report of the commissioner was unfavorable to the provisional government to such an extent that the President felt impelled to lay the facts as he saw them before Congress, which he did in a state paper under date of December 18, 1893, a paper unsurpassed in its conception of the duties, as well as the rights, of the United States under the law of nations.

The message is rather lengthy and argumentative, but its conclusions are so fundamental that we must lift here and there an appropriate passage because we believe that it is a perfect statement of that good faith which the United States should have in all its relations with other nations,—more especially, be it said, with the weak and the defenseless.

It must be admitted that, so far as the records of history show, President Cleveland did an unusual thing to appeal to international law in order to condemn the policy which the Government of the United States had adopted and to repudiate the material advantages which would have accrued to the United States through the ratification of the treaty. Ordinarily, nations have recourse to international law in order to bolster up rather than to condemn their claims against other members of the international community. But President Cleveland was not of that ilk. The law of nations was, in his opinion, as we shall see, applicable to all nations, including the United States,

and could not be varied a hair's breadth in its application to a downtrodden and—as others might say—an inferior people.

But to the message itself. After a few preliminary observations, President Cleveland said: [6] "I suppose that right and justice should determine the path to be followed in treating this subject. If national honesty is to be disregarded and a desire for territorial extension or dissatisfaction with a form of government not our own ought to regulate our conduct, I have entirely misapprehended the mission and character of our Government and the behaviour which the conscience of our people demands of their public servants."

Having appealed to the national honesty and the conscience of the American people, President Cleveland, after a detailed examination of the facts —which in his opinion established the unlawful participation of representatives of the United States in the overthrow of the legitimate Hawaiian Government—proceeded to state his own attitude in the premises: [7]

> Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, . . .

After stating that these views should be conveyed to the Provisional Government, President Cleveland continued with a homily on good faith in international relations: "It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals." Now this statement doubtless revealed the governmental policy; but President Cleveland wished, as it were, to appeal from the government to the people: "I mistake the American people if they favor the odious doctrine that there is no such thing as international morality; that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory."

This statement of the American people's conception of the equality of nations should be printed in golden letters and serve as a primer for all diplomatic officers of these United States.

It was not enough, however, in President Cleveland's view, to condemn the action of the preceding administration and to proclaim what unfortunately are generally considered platitudes in foreign offices. When a wrong had been committed, it was the duty of the wrong-doer to redress that wrong, and therefore it was the duty of the United States, in President Cleveland's conception of international law, to redress the wrong which it had committed. But what was the international law which President Cleveland had in mind? "The law of nations," he declared,[8] speaking in behalf of the United States

[6] Richardson, *op. cit.* (1898), Vol. IX, p. 461.
[7] *Ibid.*, p. 470.
[8] *Ibid.*, pp. 470–71.

and to representatives of the people of the United States, "is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized state are equally applicable as between enlightened nations . . . and the United States, in aiming to maintain itself as one of the most enlightened nations, would do its citizens gross injustice if it applied to its international relations any other than a high standard of honor and morality." The United States, he went on to say, could not continue to countenance a wrong after its commission any more than it could consent in advance to its commission, adding that "on that ground it" —meaning the Government of the United States—"can not allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform." "On the same ground," he continued in a statement with which we must conclude, "if a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation."

Thus to his eternal credit President Cleveland, speaking in the name of the United States and in behalf of its honor and duty, expressed in clear and unmistakable terms the standard of conduct which a "civilized state" and an "enlightened nation" should apply in its relations with all other members of the international community, whether large or small, powerful or weak. His definition of international law as founded on reason and justice is and should be the very cornerstone, so to speak, of our international policy.

There was nothing of "my country, right or wrong," in Grover Cleveland's make-up. His country *should* always be right; and, if wrong, it should rectify the mistake. He was, as it were, a high priest of justice in the seats of the mighty.

But let us turn now to another aspect of our subject. Our every-day relations are in no small measure determined by agreements or contracts. And we are careful that the terms of our agreements, which are the measure of our rights, are so clear that they can not be misunderstood; and, that there may be a record of these terms, they are set forth in a written contract, with all the formalities that the law requires, so that if a dispute should occur, the agreement of the parties in all fulness and detail will be before the court for interpretation, to be the basis for the findings of the court and for the judgment which it renders.

Now there may be a difference in form, but there is none in substance, between the contracts or agreements of private individuals and those which the duly authorized representatives of nations composing the international community make from time to time. For in both cases the agreements are, with the most meticulous care, reduced to writing, signed and sealed and delivered to each of the contracting parties. Thus if a controversy over the agreement occurs in the future between the parties, each is possessed of what

is considered to be an original. Should a dispute occur in the case of individuals, resort is to the local court; in the case of States, to an international court,—and fortunately at last such a court exists at The Hague, under the title of the Permanent Court of International Justice.

So much for agreements and their interpretation. But what of the so-called political controversies which arise between States?

First of all, is it true that all or even the majority of the questions arising between nations are political rather than judicial? That they are or must be political, President Cleveland by implication denied; and indeed, he would doubtless have denied that even controversies considered as wholly political could not be justiciable. For did he not say that the justice applicable between individuals is equally applicable between States?

Fortunately we have a definition of justiciable controversies set forth in incontrovertible terms by the highest tribunal of the United States. In the case of State of Rhode Island *v.* State of Massachusetts [9] (decided in 1838), the dispute turned on the boundary between the two States, Massachusetts maintaining that the question was a political one and therefore not within the jurisdiction of the court, whereas Rhode Island—which filed its bill against Massachusetts—necessarily argued in favor of the justiciable nature of its claim.

In the course of his elaborate opinion, Mr. Justice Baldwin discussed the question in its various aspects, saying that the States of the American Union had vested the Supreme Court of the United States with jurisdiction of suits between the various States and that, as this was a suit between two States of the American Union, the court could take jurisdiction of the dispute, if it were justiciable. This naturally led the learned justice to inquire whether a controversy between two States of the Union which was considered political in its nature might become a justiciable question and therefore be decided by the Supreme Court. "We are thus," the learned justice said,[10] "pointed to the true boundary line between political and judicial power, and questions. A sovereign decides by his own will, which is the supreme law within his own boundary; [11] a court or judge decides according to the law prescribed by the sovereign power, and that law is the rule for judgment." So far, so good; but what then is the answer to the query? The answer follows immediately:

> The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; [12] . . . From the time of such submission, the question ceases to be a political one to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power.

This is a statement of principle leading to, but not expressing, the conclusion

[9] 12 Peters, 657. [10] *Ibid.*, 737. [11] 6 Peters, 714; 9 *ibid.* 748. [12] 11 Vesey, 294.

at which the court had arrived. However, the conclusion, when it comes, is as complete, we believe, as it is incontrovertible:

> These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation; . . . the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding of it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them. . . .

Here we have the settlement of the whole vexing question as to when a political controversy becomes a justiciable question, and therefore is to be decided in a court of justice. The nature of the controversy itself does not change. It is still the same dispute; but the agreement of the parties to withdraw it from the political field and submit it to the decision of a court of justice renders it justiciable rather than political as regards its settlement.

Now the groups making the union of States which we call the United States of America had renounced their respective rights to maintain armies and navies, which had theretofore been the recognized means of deciding a controversy which diplomacy could not adjust. This action on the part of the States was in plain terms a renunciation of the right of war between the States. However, they provided instrumentalities of justice of their own creation which could settle by due process of law what they were unwilling to have settled by a resort to force. Since the formation of the Union, there have been numerous controversies between the States which have been presented to and decided by the Supreme Court of the United States, and as the years pass these suits are becoming more numerous than in the early years of the Republic, because experience has shown that the reference to the Supreme Court of such controversies has resulted in judicial settlements which have proved satisfactory to the litigating States, to such a degree, indeed, that every such decision has been accepted and carried into effect without the exercise of a "sanction" on the part of the Government of the United States.

What thirteen American States could and did establish and 48 States of the expanded American Union accept as a means for the final settlement of controversies that arise between them from time to time, the civilized States of the world could likewise establish and accept. They have done so within the past fifteen years, and the concrete result of their action is the Permanent Court of International Justice, established at The Hague, which is open at any time to receive, consider and decide controversies of any and indeed all States which in times past were regarded as political but which by their very submission to the court become justiciable. And the question of the enforce-

ment of the court's decisions, as in the case of the judgments of the Supreme Court of the United States, has never arisen because the high litigating parties have acted in honor and in good faith. The conception of the justiciable nature of controversies between the States may be termed the seventh stone of our American foundation of the law of nations.

But the stones of a foundation are usually held together by something more than their weight. There is a separate but important element binding them together, and this element in our structure of the law of nations is good faith. What does good faith mean? It means, for the State as for the individual, the full and conscientious performance of all obligations, whether these obligations are incurred toward the strong or the weak, and whether they result in advantage or disadvantage. There is no agreement, formal, informal, express or implicit, between nations or between individuals, that does not rest upon good faith, and in the long run there can be no relations except those of suspicion and ultimate enmity between individuals or groups of individuals if they are not permeated throughout by good faith.

Let us, then, call the roll of the foundation-stones upon which our conception of international law rests today and upon which it should and must rest in the future. Or, to repeat the inquiry with which we began, what does this international law mean to us? It means to seek always, as Franklin sought, a plan to insure the settlement of disputes between nations without their "first cutting one another's throats"; to advocate, as did Washington, by deed as well as word, "that all questions between this and other nations be speedily and amicably settled"; to bear always in mind Gallatin's noble dictum "that the true honor and dignity of the nation are inseparable from justice"; to hold fast to Lincoln's "faith that right makes might"; to bring into the fullest realization Grant's prophecy of "a day when there will be a Court established, that shall be recognized by all nations, which will take into consideration all questions of difference between nations, and settle by arbitration or decision of such Court, those questions"; to remember always Cleveland's definition of the law of nations as "founded upon reason and justice," and to be applied equally and impartially in our relations with all States, small or large, in accordance with "a high standard of honor and morality"; to bear witness to the American doctrine that the so-called political controversies become justiciable upon their submission, by the States in controversy, to an international court of justice; and finally, to realize that the foundation of international law will inevitably crumble if it lacks the binding force of good faith in all of the relations between nations.

Chairman WILSON. The Chairman of the Executive Council I think rather misinterpreted the plans which the Executive Committee had. They found they were without a President and, looking through the list of the Vice Presidents, invited them in alphabetical order. They picked on me.

The subject of my address this evening is "The United States and Inter-

national Law," which is very close to the subject which Dr. Scott had chosen. This afternoon when I heard this recommendation I asked for the privilege of looking over Dr. Scott's address. We do not duplicate very much, so I recommend that you read his first. The reason for choosing this subject was because my orders coming in a telegram from the Secretary to preside at this meeting also said: "In your telegraphic reply include a subject," and this seemed to be as good a subject as any.

THE UNITED STATES AND INTERNATIONAL LAW

By George Grafton Wilson

Professor of International Law, Harvard University

In his speech before the Council of the League of Nations last Monday, April 20, 1936, Anthony Eden is reported as saying:

> If there is to be lasting peace in the world, the League's Covenant, which is the law of nations, must be respected. The members of the League are under a binding and inescapable obligation to observe that Covenant. If they fail to observe it; still more, if a nation which violates the Covenant is enabled to do so with impunity, how can there be confidence in international law in the future?

In this paragraph Mr. Eden refers to different types of international law. When Mr. Eden says that "the League's Covenant, which is the law of nations, must be respected," he follows this statement by another, "The members of the League are under a binding and inescapable obligation to observe that Covenant." Here he is speaking of conventional international law based on treaty.

Later, in referring to a different type of international law, he asks, if the parties to the Covenant violate its provisions "how can there be confidence in international law in the future?" He further says that "unless they were to go back upon their signature they had no alternative but to take their share" in fulfilling the treaty obligations, thus presenting the point of view called voluntary international law and calling up the ancient maxim, *pacta sunt servanda*. That treaties are to be fulfilled by the parties to them is a generally accepted principle of voluntary international law regardless of the content of the treaty.

Mr. Eden also distinctly refers to "the present non-universality of the League," though not to excuse members from, but to indicate their obligations under the articles of the Covenant, without in the least implying that non-members are under these obligations. He even says if parties to the Covenant fail to observe it, and still more if a nation may violate it with impunity, "how can there be any confidence in international law in the future?" This query refers both to the conventional and voluntary international law.

Vattel, who had published his treaties before the American Revolution,

referred to these types of international law and also to a third type, discussing all in a clear and logical manner.

Many of the leaders in the early days of the United States were familiar with the book of Vattel on *The Law of Nations or Principles of the Law of Nature applied to the conduct and affairs of Nations and Sovereigns.* Vattel in regarding nations as "being free, independent and equal, and each having a right to judge according to the dictates of conscience, of what is to be done in order to fulfill its duties," says "the effect of this is, the producing, at least externally, and among men, a perfect equality of rights among nations, in the conduct of their affairs and the pursuit of their policies." This constitutes the field which Vattel calls the voluntary law of nations. The several engagements into which States enter with one another is conventional international law. Customs consecrated by long use and observed among nations take the form of customary international law. Vattel says, "These three kinds of the law of nations, *voluntary*, *conventional*, and *customary*, together compose the *positive law of nations*, for they all proceed from the volition of nations; the *voluntary law* from their presumed consent; the *conventional law* from an express consent; and the *customary law* from a tacit consent."

As members of the Constitutional Convention of 1787 seem to have been familiar with the work of Vattel, it is but natural that the Constitution of the United States should reflect the international law of the period. When Article III, section 2, states that the judicial power of the United States extends to all treaties "made, or which shall be made, under their Authority," this power relates to conventional international law. What should be embodied in the articles of these treaties which were made under the authority of the United States and in the manner prescribed would be within competence of the constituted authorities to determine or would be voluntary in nature.

Article III, section 2, also states that the judicial power extends "to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States," etc. The cases "affecting Ambassadors," would, except rarely when otherwise provided in treaty articles, follow international law and precedents long antedating the existence of the United States. In such case what Vattel calls customary international law prevails.

Maritime maxims such as *de lege de jactu*, more ancient than historical records, would often be followed in the American courts of appropriate jurisdiction without need of domestic legislation. As was said by the Supreme Court in the case of the *Scotia* in 1872, "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world."[1]

The United States has also respected principles recognized as internationally binding though not formally embodied in a convention to which it

[1] 14 Wallace, 170.

was a party. This was the case in the Geneva Convention (Red Cross), August 22, 1864, though the United States did become a party to this convention on March 1, 1882.

To one considering the United States since 1776 and international law, the relations seem to have certain characteristics not common to other eighteenth century States. In Europe international law had been developing for many years until the European Christian family of nations had assumed a dominant position. These nations, though separated by conventional geographical boundaries, as well as ethnical, political and other barriers, did, nevertheless, have a certain degree of unity and interdependence due to geographical proximity. Recurring struggles in Southeastern Europe and along the Rhine came to be anticipated, and adjustments such as those relating to the Bosphorus and Dardanelles or the Rhine area were rarely of long duration.

On the other hand, the geographical, ethnic, historical, and political backgrounds and bases of what is now the United States of America have by its detachment from Europe been significant for international law.

In the early fifteenth century, the British Isles were regarded as the "West Side of the World," and it was supposed that sailing a short distance beyond, one fell off the earth. Certainly Columbus introduced by his discovery in 1492 many new problems of all kinds as well as those relating to the resources beyond the sea. How was the land to be divided, and what should be the elements of good title? What treatment should be given to these peoples who seemed to have no background of European civilization and who spoke no known language? The geographical and ethnic knowledge of the fifteenth century was inadequate to the new day dawning for the sixteenth century.

Even before there was any United States the geographical area now within its boundaries was a matter of importance to international law. Victoria (1480–1546) was apparently a boy to whom the discovery of America by Columbus in 1492 made an appeal. In his lectures (1532) on Matthew, XXVIII, 19, "Go ye therefore, and teach all nations, baptising them," Victoria, speaking "On the Indians lately discovered," raises the interesting question, "Whether the Indian aborigines before the arrival of the Spaniards were true owners in public and in private law." After lengthy refutation of many writers, he concludes "the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view." Surprising as it may seem, Victoria four hundred years ago says:

> Granted that the Emperor were the lord of the world, still that would not entitle him to seize the provinces of the Indian aborigines and erect new lords there and put down the former ones or take taxes. The proof is herein, namely, that even those who attribute lordship over the world to the Emperor do not claim that he is lord in ownership, but only in jurisdiction, and this latter right does not go so far as to war-

rant him in converting provinces to his own use or in giving towns or even estates away at his pleasure.[2]

Thus from the earliest times of the discovery of America, the problems of status of persons and property in the New World were raised. Roger Williams, a theologian of a very different sect, a hundred years later, in New England, advocated views similar to those of Victoria, maintaining that the natives were the true owners of the soil, a view which made him very unpopular in conservative Massachusetts Bay, a commonwealth from which he was banished in 1636 by a decree just repealed in 1936.

The question early raised by Victoria and answered by Williams came before the Supreme Court of the United States nearly three hundred years later than Victoria, in 1823, when Mr. Chief Justice Marshall reviewed questions of rights of discovery in the case of Johnson and Graham's Lessee *v.* William M'Intosh.[3] In this case Marshall, perhaps pronouncing some words with a circumflex accent, said:

> On the discovery of this immense continent, the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
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> . . . . .
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> The history of America, from its discovery to the present day proves, we think, the universal recognition of these principles.

In a later opinion, Mr. Chief Justice Marshall, doubting whether Indian tribes could under the Constitution be denominated foreign nations, says "They may, more correctly, perhaps, be denominated domestic dependent nations." [4]

[2] *De Indis et de jure belli relectiones*, Classics of International Law, p. 134.

[3] 8 Wheaton, 543.

[4] Cherokee Nation *v.* Georgia (1831), 5 Peters, 1.

In the first letter of Columbus, 1493, he says "I took by force some Indians from the first island." Nine Indians were reported as taken by Columbus to Spain, and, though baptized at Barcelona as one old record says, it may be doubted whether they and their families appreciated the advantages of European travel and baptism. Even the Mayflower Company took some of the stores of corn and beans belonging to the Indians, hoping later to make to the Indians "large satisfaction." In spite of the early practice of Europeans in depriving the Indians of land, life and property, as well as setting one band of Indians against another, gradually the Indians were absorbed into the citizenship of the United States. Not all American States followed this practice, though a Massachusetts statute of 1869 made all Indians "citizens of the Commonwealth."

Prior to the Declaration of Independence, Washington had in mind the need of a court to settle title to property which might fall into the hands of the Continental forces in order that confusion might not result. Such confusion did occasionally arise, as was shown in the early case of Penhallow *v.* Doane's Administrators in regard to which it was said:

> The pleadings consist of a heap of materials thrown together in an irregular manner, and if examined by the strict rules of common law, cannot stand the test of legal criticism. We are, however, to view the proceedings as before a court of admiralty, which is not governed by the rigid principles of common law.[5]

The United States were, however, congenitally belligerents. The States were born into war, and brought up through early years under the laws of war. In the Declaration of Independence, July 4, 1776, which was to be "proclaimed in each of the United States and at the Head of the Army," it was said "that as *Free and Independent States*, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Before peace was concluded or a supreme court established, the American courts respected international law, and as early as 1781, in the case of the *Resolution*, it was declared that, "The municipal laws of a country can not change the law of nations so as to bind the subjects of another nation."[6] After the Supreme Court was established, the pronouncement was still more clear as in the case of Ware *v.* Hylton in 1796 when Mr. Justice Chase said:

> Before these solemn acts of separation from the Crown of Great Britain, the war between Great Britain and the united colonies, jointly, and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon all the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all the former political connection between Great Britain and Virginia, and also be-

[5] 3 Dallas (1795), 54. [6] 2 Dallas, 1.

> tween their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France.[7]

In the same case, Mr. Justice Wilson said, "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."

The United States, therefore, had from the beginning an international law that had for two hundred years been gaining increasing recognition. From this law its practice became somewhat selective, but not to such a degree as to create undue opposition.

The first great crisis with Great Britain which led to American independence was followed by many others with the same State. The Provisional Articles agreed upon in 1782 recognized the thirteen free and independent States which had existed since 1776, and the general northern boundary line. It also provided

> that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish.

This was repeated in Article 3 of the Definitive Treaty of Peace of September 3, 1783, and became the subject of recurring controversies for a hundred years till settled by the Permanent Court of International Arbitration in 1910. Closeness of contact usually develops friction, but this has not proven true in relations with Canada because of legal provisions for adjustment of boundary controversies.

Many other controversies between the United States and Great Britain have been settled by arbitration or by mixed commissions "on the basis of respect for law." In 1910 a special agreement between the United States and Great Britain was concluded under which financial claims "outstanding between the two Governments at the date of the signature" were to be submitted to arbitration. At the opening session, the President of the Tribunal said,

> The difference between this and other arbitral tribunals is that we have not to settle one subject of litigation but a large number of cases entirely different in fact and in law one from the other, arising out of various circumstances, and having a very different character—fishing and shipping claims, property rights, collection of customs duties, naval and military operations, government contracts.[8]

The treaty-making power was early exercised by the United States, but before 1789 each of the thirteen States might give different interpretations to the terms of a treaty. By the Constitution, the judicial power of the United

[7] 3 Dallas, 199.

[8] American and British Claims Arbitration, Report, F. K. Nielsen, p. 17.

States as a federal state was extended to "treaties made, or which shall be made, under their authority." Many decisions of the Supreme Court of the United States from its institution to the present day have affirmed that "international law is a part of the law of the land," [9] and to be "ascertained and administered by the courts of justice of appropriate jurisdiction." [10]

In fields of law for which provision had not been made, or only in part made, the United States has not been slow to assert its position. This position has been in general a reasonable one because, on account of geographical isolation, the attitude of the United States might be non-partisan and impartial.

The attitude of the United States on the doctrine of neutrality was developed at a peculiarly fortunate period. Catherine II of Russia had in 1780, by support of an Armed Neutrality, demonstrated the advantages of freedom of, and secured respect for, innocent commerce in time of war. The concept of neutrality had been much clarified, so that the proclamation of April 22, 1793, did not need special explanation, and the Neutrality Act of 1794 became a convenient standard to which other States referred and of which the British statesman, Canning, said in 1823, "If I wished for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson." [11] This was a type of neutrality that would approximate to that defined by Bynkershoek early in the eighteenth century when he said "I call those *non hostes* who are of neither party." This was a view distinct from that of Grotius of the early seventeenth century, which stated it to be "the duty of those who have no part in the war to do nothing which may favor the party having an unjust cause, or which may hinder the action of the one waging a just war . . . and in case of doubt to treat both belligerents alike." [12]

In recent years some States have been inclined to swing away from the eighteenth century position of Bynkershoek, Catherine and Washington, and revert to the Grotian doctrine.

In his farewell address of September 17, 1796, Washington set forth, as based upon his practical experience, a caution which may well underlie sound international negotiation even in these days, and which underlies sound international law as well. Washington said, "There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion which experience must cure, which a just pride ought to discard." Someone has said that armed strength is the gold reserve behind the diplomatic paper currency, and that without the armed strength the diplomatic paper might be valueless in a crisis. Washington in this farewell address seems to advise some gold reserve in form of armed force saying, "Taking care always to keep ourselves by suitable establishments on a respectable

[9] *The Charming Betsy* (1804), 2 Cranch, 64.

[10] *Paquete Habana* (1900), 175 U. S. 677.

[11] 5 Speeches, p. 50.

[12] *De jure belli ac pacis*, Lib. III, c. XVII. III. 1.

defensive posture, we may safely trust to temporary alliances for extraordinary emergencies."

Not merely in the broader realm of general national well-being did the United States take advanced positions, but its representatives took thought for individual well-being.

As early as 1781, Franklin, then in France, stated a general principle for which the United States has stood, saying,

> Passy, 8 June, 1781
>
> There are three employments which I wish the law of nations would protect, so that they should never be molested or interrupted by enemies even in time of war. I mean farmers, fishermen, and merchants, because their employments are not only innocent, but are for common subsistence and benefit of the human species in general. As men grow more enlightened, we may hope this will in time be the case. Till then we must submit, as well as we can, to the evils we can not remedy.

Franklin also hoped to introduce a clause to this effect into the treaty with Great Britain in 1783. The position set forth in the letter of Franklin was an advanced one, and after more than a hundred years in 1907 in Hague Convention XI it was at length agreed in Article 3 that "Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture together with their appliances, rigging, tackle, and cargo." The Supreme Court had, however, previously declared in the case of the *Paquete Habana and Lola* in 1900 that,

> By an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish have been recognized as exempt, with their cargoes and crews, from capture as prize of war.
>
> . . . . .
>
> This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.[13]

The relation of persons to the interpretation and formulation of international law concepts in the United States can not be disregarded. The decisions particularly of Mr. Chief Justice Marshall in the Supreme Court touched upon many principles of international law. Henry Wheaton as reporter of decisions of the Supreme Court came in close contact with all matters before the court.

Henry Wheaton had been admitted to the bar in 1805 at the age of twenty and then went abroad to study. He went to Poitiers, then a renowned school of law. He also studied carefully the French Code and even translated it into English. The events of the War of 1812 and the advice of

[13] 175 U. S. 677.

Judge Story encouraged him to undertake the preparation of an essay on the law of prize. In this work he found much conflict "between the new and the old law of nations." This work received the commendation of Lord Stowell. Wheaton had been a judge advocate of the army and later a justice of the Marine Court. This training was an excellent preparation for the duties of reporter of the decisions of the Supreme Court of the United States, a position which he occupied from 1816 to 1827. This was a period during which he associated intimately with Chief Justice Marshall and other members of the court, then growing in reputation and dignity. In 1820 he had read before the New York Historical Society a brief paper on the "History of the Science of Public International Law."

When appointed as Chargé d'Affaires to Denmark in 1827, Wheaton was to have practical experience in a field for which he was specially prepared.

One hundred years ago, in 1836, the year following his transfer to Berlin, Wheaton published his *Elements of International Law* which has since remained a standard.

When Wheaton returned to America in 1847, Albert Gallatin, then in his 86th year, escorted him to the table at a public dinner tendered him in New York, and said he "would not have assisted at a public dinner given to any other man in the world." Viewing his work as a diplomatic representative of the United States abroad, he said: "The office of a Foreign Minister is the office of a peace maker. Diplomacy has been supposed to be a master of craft and deceit; but I believe that honor and integrity are the true arts of the diplomatists."

The wide influence of the United States through Wheaton's writings is shown in the many editions of his *Elements of International Law* in English as well as foreign languages, even in Chinese and Japanese.

Francis Lieber also made special contributions to international law. In the address of the first President of this Society, Elihu Root, on April 24, 1913, attention was called to the fact that on that date fifty years earlier there had been issued by the War Department in the time of the Civil War, General Orders No. 100. This order was entitled "Instructions for the Government of Armies of the United States in the Field," and contained 157 articles. It soon came to be known as "Lieber's Code." Lieber, though born in 1800, had fought at the battle of Waterloo and later in the Greek War for independence and came to the United States in 1827. A professorship in the South Carolina College in 1835 and in Columbia College in 1857 gave him a sympathetic understanding of the people of the North and of the South, and his early days in Europe gave him an understanding of war. There was, therefore, in Lieber a background which enabled him to see war from the point of view of both belligerents and with a practical and theoretical appreciation of its problems. It was not presumptuous, but rather prophetic, that he should write to General Halleck on May 20, 1863:

> As the order now stands, I think that No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French, and Germans. It is a contribution by the United States to the stock of common civilization.

Lieber's Code did immediately become the basis for other codes, as the Brussels Code of 1874, the Oxford Manual of 1880, the Laws and Customs of War on Land of the Hague Conferences of 1899 and 1907, which were embodied in or printed with many of the instructions issued by belligerent governments during the World War. Indeed, in the preface to the Rules of Land Warfare issued by the War Department of the United States, April 25, 1914, it is said:

> It will be found that everything vital contained in G. O. 100, of A. G. O. of April 24, 1863, "Instructions for the Government of Armies of the United States in the Field," has been incorporated in this manual. Wherever practicable the original text has been used herein, because it is believed that long familiarity with this text and its interpretation by our officers should not be interfered with if possible to avoid doing so.

The British rules include Lieber's Code in the brief bibliography of 24 titles to which reference is made. Lieber's Code also became the inspiration for Bluntschli's *Codification of International Law* which appeared in Germany in 1868. The editions of Bluntschli's work in different languages had wide acceptance, and though in part issued in 1866, during a period of wars, it markedly influenced the conduct of hostilities. Of the articles of Lieber's Code, Bluntschli says:

> They will contribute powerfully to fixing the principles of the law of war. Since they are drawn up in accordance with the nature of things and according to the thought of our times, European states can not in this particular stay behind the United States of North America without being put under the ban of public opinion, and being accused of not rising to the level of progress set by the international law of civilized humanity.

Laboulaye, himself a distinguished scholar, in an introduction to the French edition of Bluntschli in 1869, speaking of Lieber's Code, said, "In reality, these instructions are a little masterpiece. It is no small thing to have thus established law in the empire of force, by bringing under the yoke of law the customs and the excesses even of war." As a Frenchman, Laboulaye says that "on the plane of justice and humanity, French, German, American join hands. For law and for truth there are no frontiers."

The United States early took a position which was contrary to the current European views upon the legal basis of State existence. The United States could not, when looking to its own origin and to its attitude toward States to the south of its boundaries, consistently deny the right of revolution. To many Americans the reactionary treaty known as the Holy Alliance might properly be described in the words of Metternich as "verbi-

age," though the same Americans would not agree with his characterization of liberalizing movements of that time as "moral gangrene."

The United States from geographical proximity was under necessity of taking account of and judging the legal status of the many uprisings on the Western Continent. The Supreme Court took note of "The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense." [14] Such a position might by some of the older States of Europe be regarded as destructive of the foundations of civilization, while in the United States it might receive official approval. As the United States increases in age, however, it tends to become more conservative.

In the early days of the United States, there was relatively little attention given to maritime jurisdiction. Jefferson thought it might be well "to accustom the nations of Europe to the idea" that the United States in the future would claim jurisdiction to the range of vision off shore, estimating this as from 20 to 25 miles, and Kent would support a doctrine similar to the early seventeenth century English claims to the Kings Chambers, by extending jurisdiction to lines from headland to headland off the Atlantic coast and from the south cape of Florida to the Mississippi. The Gulf Stream was proposed as a maritime boundary for the United States. Gradually such positions yielded to the reasonable and practical point of view of Bynkershoek of a hundred years earlier, and recent treaties and decisions have accepted "a marginal belt of the sea extending from the coast line outward a marine league or three geographic miles." [15]

The jurisdiction over ships on the sea, cables under the sea, flora and fauna in the sea, has grown in importance and complexity. Owing to the long coast lines of the United States, this has become a matter of capital concern, and as precedents have been few, conventional agreements have been made, and have of necessity recognized principles or positions which it was hoped would be regarded as fundamentally sound.

The argument that it would not be sound judgment to destroy the source of supply of valuable maritime products has been accepted. The Bering Sea Convention for conserving fur-bearing seals was concluded between the United States and Great Britain in 1891, and a similar convention of 1911 added the support of Japan and Russia. A convention for the preservation of the halibut fishery was concluded between the United States and Canada in 1930, and a general convention for the regulation of whaling was signed by the United States on March 31, 1932, becoming effective on January 16, 1935.

The air space over a great area like that of the United States may not of necessity give rise to more problems than that of the air space over a State

[14] *The Three Friends* (1897), 166 U. S. 1.

[15] Cunard S. S. Co. *v.* Mellon (1923), 262 U. S. 100.

like Switzerland which is about one-half the area of the State of Maine. The problems have, however, multiplied because these conflicts in regard to aërial jurisdiction may in many respects involve jurisdiction between the 48 States of the United States as well as between the United States and foreign States, and many of the controversies between States of the United States are adjudicated by the same principles as would prevail in international controversies.

The coming of immigrants to the United States from all parts of the world involved problems for the government which held that all persons born or naturalized in and subject to its jurisdiction were citizens. The United States had for a time ample room for all and even offered inducements to settlers in some areas. Conflicts in jurisdiction arising out of differences of opinion upon the application of *jus soli* and *jus sanguinis* were many. As the resources of the United States became more generally appropriated, the freedom of immigration, in spite of protests, was restricted, and the right of mankind in general to the fruits of the earth of the United States was denied.

It was somewhat surprising to Old World minds to have it intimated in 1898 that the United States would ever give up its occupancy of Cuba, when the status of that island was left under Article 1 of the Treaty of Peace between Spain and the United States resting upon the following provisions,

> Spain relinquishes all claim of sovereignty over and title to Cuba.
>
> And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Under this same treaty Spain ceded to the United States the Island of Porto Rico and other neighboring islands, and also Guam and some other islands in the Pacific (Article 2).

Spain also ceded to the United States the Philippine Islands, and the United States agreed to pay to Spain twenty million dollars (Article 3).

Many had thought that all these territories would follow the European custom and become integral parts of the United States.

Cuba became fully independent, and even the Philippines are now in the process of becoming independent by virtue of the law of the United States of March 24, 1934, which law also provides that at the earliest practicable date the United States will take action "with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands." By nineteenth century leaders such action might almost be regarded as throwing away opportunities.

Law existed before rules of law and before law schools and professors of law, or even before Blackstone. The latest codes have elements which can be traced to the codes of ancient Rhodes and some survivals indicate a

Biblical influence, though now some kings might find difficulty in establishing clear claim to the title, *rex dei gratia*.

The United States thus had the advantage of entering into statehood in 1776 when a body of developed international law already existed. The early days showed the difficulties of settling common international matters through thirteen differing agencies and emphasized a regional community of action. Within the United States an amount of power, sufficient to develop an understanding that interdependence should be recognized as a sane basis of existence, still resided in the States. This principle, now recognized in 48 States, could for world well-being be extended more widely.

International law rests ultimately upon the consensus of mentality of mankind, as is formally recognized in Article 9 of the Statute of the Permanent Court of International Justice when, in referring to the membership of the court, it is provided that "the whole body also should represent the main forms of civilization and the principal legal systems of the world." It is not varying and variable like State law, which may be determined by the party for the time in control of the legislative organization. International law to be really operative must appeal to the fundamental juridical concepts of diverse peoples, whether Brazilian, Dutch or Japanese. This is evident as the so-called "European Christian family of nations" dropped the first adjective in the name when the United States was added to the family in 1776, and the second with the entrance of Turkey in 1856. Thus the exclusiveness disappeared and only the family of nations remained—to the law of which the United States has for 160 years made significant contributions.

Chairman Wilson. As the next speaker on our general topic, "The rôle of international law in peaceful change," we have the privilege of hearing Professor Parker T. Moon, of Columbia University.

THE NEED FOR PEACEFUL CHANGE IN EUROPE AND THE FAR EAST

By Parker Thomas Moon

Professor of International Relations, Columbia University

When Ramsay MacDonald as Prime Minister of Great Britain remarked that "every treaty is holy but no treaty is eternal," he uttered a half-truth. The truth was in the second half of the aphorism. The first half is "more honored in the breach than the observance" of major treaties, although an exemplary reverence for the status quo has been inculcated by some Powers, most notably, perhaps, by the United States and France. Respecting the peace settlement in Europe, a truly militant piety has been evinced by France and her allies. In Eastern Asia the United States has been the foremost opponent of illegal change. In America, too, as sponsor of the Monroe

Doctrine and Pan American peace, we may admit as modest patriots, the United States plays the leading rôle in the maintenance of the established order.

The status quo, however, refuses to freeze without cracking. In the Far East Japan's amazing efforts to become "the stabilizing force" (to quote a Japanese Foreign Minister) may not have been recognized, but they have at least broken the ice. There have been two wars recently in Latin America. In Africa, Mussolini's airplanes are dropping effective bombs on the status quo. In Europe, Hitler tears up the Versailles Treaty and the Locarno Pact, not without some risk of war, while an exasperated France holds military conversations with her allies and desperately proposes (in the latest Parisian peace plan, published on April 8) that no one shall even ask for a change in the map for a quarter-century. Even if the French proposal for an international army to defend existing treaties were adopted, I would be willing to turn prophet and to predict its failure.

No rigid, congealed status quo can withstand the volcanic force of hot national passions. When Mussolini told the world that Italy must expand or explode, the seismographs at Paris and London did not register, but Italy did explode.

Not prudence alone, but justice demands peaceful change in a changing world. The peace treaties of Versailles, Saint-Germain, Neuilly, and the Trianon were in many respects unjust treaties. Unjust, too, were the treaties Japan forced upon China in 1915. And other treaties, fair enough when they are negotiated, may work injustice if they are not adapted to altered circumstances. Nations that insist upon enforcing unjust treaties must share the guilt of the nations which violate those treaties.

If a frozen status quo means injustice at best, and war at worst, then the alternative is revision of maps and treaties. But not the kind of revision naïve reformers may dream about, nor the revision demanded by impassioned spokesmen of aggrieved nationalities.

In a novel by H. G. Wells, the amiable Mr. Britling thought he could draw an ideal map for the world, giving self-government to each separate race or nationality. Perhaps that can be done in a novel, but at Paris in 1919 we discovered that it could not be done in a peace conference.

There is no ideal map. Mussolini once declared that the northern frontier of Italy, along the Alpine crest, was traced by the finger of God. Such theological cartography is regrettably rare, and human map-making will remain very unsatisfactory until we can move mountains and rivers to the right places and persuade people not to live in the wrong places. Where races are inextricably entangled, as in Macedonia, Bessarabia, Transylvania, or Upper Silesia, scientific frontiers can be drawn only in the fourth dimension.

Still more baffling is our lack of agreement on any single standard of self-determination. Instead of any one criterion, there are almost a dozen in common use and rarely in agreement—language, race, religion, geography,

culture, history, political ideals, economics, social customs, treaty rights, the will of the people, and so on. At the Paris Peace Conference the Czech delegation claimed all of Bohemia on historic grounds, Slovakia on linguistic grounds, in defiance of history, and other regions on economic grounds, disregarding both language and history. I could cite a great number of similar instances, but I know of only one case in which all the divergent criteria of national self-determination were brought into perfect focus. The memorandum submitted by the Ukrainians to the Paris Peace Conference was a veritable masterpiece, for it demonstrated incontrovertibly that not only language, history and economics, but geology, botany, geography, anthropology, psychology, literature, and a singular fondness for trees and flowers all marked the Ukraine for national independence. Nevertheless Ukrainian nationalism is now submerged under Russian Communism.

If every group of people with a distinct language, or some other badge of nationality, is to have the right of self-determination, our Mr. Britling will carve out of Spain a Basque republic and a free Catalonia, sever Brittany from France (there is actually a Breton nationalist movement), separate the Flemings from the Walloons in Belgium (as Germany contemplated twenty years ago), sever Ruthenia from Czechoslovakia, trisect Switzerland, send ambassadors to Malta, and split the Soviet Union into 182 new nations. In Asia, if nationalism triumphs, there must be a Bismarck for Burma, a Korean Cavour, a Malay Masaryk, and a matronly multitude of daughters of Asian revolutions.

Our immediate concern, to return to the present, is with several peoples now on the threshold of independence. In India, Egypt, Syria and the Philippine Islands—possibly a few other places—nationalism has reached such a pitch that it cannot easily be suppressed. Yet in each case there are important economic and strategic interests of certain Great Powers, interests which must be sacrificed or adjusted. The process is delicate and arduous. It might be made less painful, and less perilous too, if in their infancy the new nations could look to a strong League of Nations for security, impartial advisers and experts, and financial aid. Without the League, such matters are sometimes difficult to arrange, as England has learned in Egypt, and the United States in the Philippines.

Turning from the liberation of subject peoples to the rectification of European frontiers, we meet self-determination under another name—irredentism. European boundary disputes have been so well publicized that an American observer might easily be moved to accept two questionable conclusions.

First, we are urged to believe that neither peace nor security can be attained until the territorial grievances of the defeated nations are satisfied. That is a counsel of despair.

Second, we are tempted to hope that peace could be assured and justice satisfied by merely moving a few misplaced boundaries, undoing the crimes

of Versailles and Trianon. Let Vilna be restored to Lithuania, Danzig returned to Germany, Macedonia ceded to Bulgaria, Hungary reinstated in her rightful domains! On closer study we discover that these are only a few of many sore spots, or potential sore spots, and each is a perplexing complex of conflicting claims.

Consider the claims of Hungary. Few grievances have been so ably presented or so sympathetically considered. The most convincing statement of the Hungarian case is given in a book by Count Stephen Bethlen, the distinguished ex-premier of Hungary, with a preface by the Rt. Hon. Lord Newton. Nothing could be more persuasive than Lord Newton's summary of the situation—

> Out of three and a half million pure-blooded Hungarians, incorporated in foreign States as a result of the World War, two millions live just outside the present Hungarian frontier and could be restored to their native country at the cost of some slight adjustments of territory in Czechoslovakia, Yugoslavia and Rumania. Apart from this claim, all that is asked for is that all the other former Hungarian subjects should be accorded the right to declare to which State they desire to belong.

Unfortunately the problem is not quite so simple. Accepting Lord Newton's geography and his statistics, we might still doubt whether the Little Entente would consider such an adjustment "slight." Indeed, I doubt whether the Little Entente would consider it at all, except after defeat in war. But even if all the areas inhabited by Hungarian majorities were re-annexed to Hungary, irredentism would not be satisfied.

As we read on in Count Bethlen's book, we learn that Czechoslovakia must surrender Ruthenia and Slovakia, the former because of economic interest and historical tradition, the latter because "the Slovaks were loyal to Hungary for a thousand years" and because "the Slovaks cannot do without the Hungarian Plain," while the Plain in turn needs Slovak timber, minerals, and water power. From Yugoslavia Count Bethlen demands the renunciation of the Bacska, the Banat, and the Baranya, because neither Serb nor Hungarian has a majority there, because no natural boundary can be drawn across a land "as level as a table," because the non-Serbs are oppressed, and because "all economic interests of the population are absolutely identical with those of the Hungarian Plains." Yugoslavia must make an additional and still greater sacrifice—Croatia. The Croats are now "completely disillusioned" and desire to separate from the Serbs. "In the name of humanity, then," Count Bethlen writes, "every decent-minded man must insist upon the Croats being at last allowed to decide their own future." Finally, the large region of Transylvania, in which the Rumanians have a clear majority over all other races combined, is to be severed from Rumania and erected into an "Eastern Switzerland," because in no other way can Hungary and Rumania be reconciled, in no other way save themselves from "the Slav ogre" and the German "Drang nach Osten."

I have quoted Count Bethlen at such length partly because the Hungarian situation is generally recognized as one of the most urgent and dangerous areas of friction, partly because the author states his case so well, but chiefly because he throws so much light on the very nature of the problem. Even the most statesmanlike irredentists demand more than they can hope to obtain by peaceful methods. The temper of nationalism does not welcome moderate solutions of territorial conflicts. When Clemenceau and Poincaré recovered Alsace-Lorraine they had to take the Saar Basin and attempt to wrest the Rhineland and the Ruhr from Germany. When Italy redeemed the Trentino she took with it a quarter-million of resentful Austro-Germans in the South Tyrol.

I can think of nothing that would contribute more to a peaceful alteration of the European map than a wise moderation of revisionist demands.

Two other desiderata might be suggested: (1) A more magnanimous attitude on the part of the Allies, and (2) A strong League of Nations, not only because it would favorably influence the psychology, but also because it would be convenient, almost indispensable, as an agency for arranging plebiscites and supervising special economic arrangements for transferred territories.

Just which boundaries should be revised, no one can say with assurance. Doubtless the Polish Corrider and Danzig would have been put at the head of the list by many, before January 1934; but when Poland and Germany signed their pact, the situation was transformed as if by magic, or by masterly control of propaganda. Other situations have changed, too; Memel, for instance, and Austria, and Bessarabia, or to go farther back, the Ulster boundary. Public policy and popular psychology are as important as race and geography in determining the direction and intensity of irredentism.

Because the psychological factor is so strong, frontier feuds might conceivably be made less bitter if frontiers could be made less important. That is to say, liberal treatment of minorities, lower trade barriers, and more internationalism would materially reduce emotional friction. Perhaps these will prove to be, ultimately, the best solutions.

For the time being, however, by any realistic appraisal, the minorities treaties have failed to produce peace, economic internationalism has declined, and several sore spots in Europe are badly inflamed. As Count Bethlen suggests, "the operating knife" may be needed. It would be the part of wise statesmanship, in my opinion, to hold plebiscites in Danzig, in the border districts claimed by Hungary, in Eupen and Malmédy, and perhaps in a few other areas, not because these are the largest irredentas, but because they might offer the least difficult complications. A few well-chosen concessions might ease the dangerous tension and encourage a more conciliatory attitude toward other conflicts of interest.

In offering this thesis for your consideration I am not unmindful of the danger that any alteration of the map may excite hopes and fears all over the Continent. Nor am I yet convinced that a general revision of the atlas, or

a universal resort to plebiscites in every territorial dispute, would be either possible or expedient.

On the non-territorial provisions of the peace treaties I offer only the briefest comment. The Covenant has been amended, the Reparation clauses virtually cancelled, the penal clauses evaded, the disarmament clauses denounced, the guarantee clauses allowed to lapse. Revision is well under way and will undoubtedly go farther. Some of the discriminatory economic and financial clauses have expired, others will have to be reconsidered. Some day the war guilt clause should be struck off the record; it was never judicious. The Covenant and the constitution of the International Labor Organization might well be separated from the peace treaties. Turkey is now asking the right to fortify the Straits; a new deal on mandates cannot be long delayed; and some day Austria may wish permission to join Germany. By opposing revision on these points the former Allies have little to gain, I think, and much to lose.

This audience is well aware that besides the peace treaties there are other unequal treaties, China's for example, awaiting revision; and that the whole system of minorities treaties in Europe is under debate; and that numerous other treaty situations are not wholly satisfactory.

About economic change I will say little, because it is to be discussed by others. Economic nationalism, imperialism, and war have grown very costly and extremely dangerous. The popular notion that economic peace can be secured by self-sufficient isolation on our part, and by redistribution of colonies on the part of other nations, is one of the most misleading of fallacies. As long as rich nations, relying on their sovereign rights and consulting their own supposed self-interest, erect prohibitive trade barriers and monopolize their natural wealth, manipulate currencies and ignore the effect upon other peoples, there will be no economic peace and I doubt whether there will be political peace. The kind of economic change now needed is not redistribution of colonies and raw materials, but redirection of policy. That implies a change of conscience, a recognition that legal rights and moral rights are not always identical. The geographical distribution of industries and resources being what it is, we must either make some progress toward economic justice among nations, or take our chances in a warlike world of clashing imperialisms.

My conclusions are five:

1. Peaceful change is needed.

2. Peaceful change should be attempted with cautious moderation, not in an ecstasy of uninformed zeal, not in any access of irredentist passion.

3. Peace cannot be deferred until all causes of conflict have been removed. They never will be entirely removed.

4. Peaceful revision will be more likely to succeed if we have an adequate mechanism of adjustment and security—and by that I mean a stronger League of Nations.

5. Above all, peaceful change depends on the willingness of nations to approach world problems not with hot resentment and not with greed, nor

with complacent insistence on rigid legal rights, but with a genuine desire to do justice and even to temper justice with charity.

Chairman WILSON. The Chairman of the Executive Council has indicated that he hoped the papers would close in time so that there might be some discussion. We now have an opportunity for discussion. Before we begin, however, I would like to thank Professor Moon for his paper. I also want to ask him if he has a copyright of that expression "ecstasy of uninformed zeal." If he does not have, I hope some of those who may wish to speak will bear in mind that there is such a thing.

Mr. BUTLER. By direction of the Executive Council given at its meeting this afternoon, I am asked to submit the following names for the Committee on Nominations which is to be appointed at this meeting and elected by the Society: Herbert W. Briggs, Richard W. Flournoy, Charles E. Martin, Fred K. Nielsen and Cyril Wynne. Other nominations may be made from the floor.

Chairman WILSON. You have heard the nominations. One of the reasons, I understand, why these gentlemen are nominated is because they cannot possibly succeed themselves; so there will be no temptation to stuff the ballot box.

(It was moved, seconded and carried that the nominations be closed.)

Chairman WILSON. The motion is made and seconded that the Secretary cast the ballot of the Society for the nominees. All in favor will signify by saying aye; contrary by saying no. (After a pause.) The motion prevails.

Secretary FINCH. The ballot has been cast.

Chairman WILSON. The Secretary reports he has cast the ballot. These gentlemen are elected as the Nominating Committee to report on Saturday.

There is now an opportunity for discussion of the topics that have been presented. There is a limitation of five minutes on speakers from the floor.

Professor CHARLES G. FENWICK. Mr. Chairman, in your discussion of the relation of the United States to international law there is a very grave gap. As I listened—perhaps my attention was momentarily diverted and I missed the point—I found no discussion of the necessity of the United States' taking part in what seems to me to be the most important part of any system of law, namely, a system of collective security. How can you talk about international law and leave out the cornerstone of the law? How can you discuss the conception held by the United States Supreme Court of the rights of the discoverer and go over details that are of no consequence and omit what is most fundamental of all? If the United States takes no part in an effort to get rid of the present international anarchy and substitute for it a true system of law, all of the rest of our discussion seems to me to be interesting but beside the point. Unless the United States will do something to help put an end to the old right of a nation to be the judge in its own case and take the law into its

own hands, unless we are prepared to be part of a collective system by which all nations get together to guarantee the weak, unless we are willing to throw in our lot and accept a collective responsibility with other nations, it seems to me our contribution to international law is so insignificant in the light of the grave issues that are before the world today that it is hardly worth recording. I say this, Mr. Chairman, with great respect, as you know, and great personal affection.

Mr. H. MILTON COLVIN. The United States, by reason of its geographical position, is naturally rather reluctant to enter into new experimentations of a world-wide nature; but her people being also of an adventurous spirit, look upon almost any kind of experimentation with great interest, hoping that it will work out, or sufficiently work out to recommend itself.

I would like to ask the gentleman who just spoke, my friend Professor Fenwick, whether he thinks the success of recent collective action in Europe through the League of Nations recommends itself to the United States to such an extent that we should join the collective system.

Professor FENWICK. Mr. Chairman, we might clear up a point. The poor success of the present system in Europe is certainly nothing to commend us to take part in that system. But the failure of the present system is a challenge to the United States to come forward and give its aid to the collective principle, a challenge to the United States to contribute something to a better world order. If we have a model "T" in the fire-truck and the engine cannot pull the truck, is it the thing to do to give up the fire department? Why not suggest a better engine for the truck?

Mr. COLVIN. It has been said the failure of the present collective system in Europe has been due to the fact that we did not join, and the other countries could not do it alone. However as we all know, the supreme power has been theirs all the time. Without taking sides as to the right or wrong of doing so, one can not help but observe how easy it would have been, for instance, to have blocked the Suez Canal and not allow any passage through it. The power was there. So how can it be said that because the United States did not enter into the collective system that is what caused it to fail. It is not because we would have added any more power to that system; that system has had supreme power. But there is a factor which I do not see can be eliminated by our joining. That is that each principal member of the collective group is more interested in protecting its particular selfish interests than it is in the success of the group. It is an intellectual conception which seems beyond the possibility of carrying out practically, because each member of the group is very much interested for the group to succeed in all respects except those respects which are to the selfish interests of that particular nation.

When England would not join in collective sanctions when her immediate special interests appeared to her to be adversely affected, when France would not join in collective sanctions when her special interests appeared to be likewise affected, you see just how selfish nationalistic interests enter into

collective ideas and plans and destroy them. It seems to me that that factor will operate just the same whether we are members of a group of nations in collective international action or not.

I merely raise the point because of the frequent statement that the present group of nations does not have the power to carry out collective action or sanctions unless we join the group. They had the supreme power to stop by collective action that which they voted to be aggression, but they did not do it.

Professor CHARLES E. MARTIN. I am very much interested in Professor Moon's canons of change and I am glad it is not merely a rationalization of the failure of contemporary international organization. However, I am somewhat puzzled by one question—What is the answer to Mussolini, who insists upon going into Ethiopia despite sanctions, and to Japan's insisting upon going into Manchuria? I wonder if Professor Moon might address himself to that question?

Professor MOON. Part of the answer is that high tariff barriers, immigration barriers and the increasing monopolization of colonial trade by the colony-possessing nations, had driven Japan and Italy to a state of mind in which they were able to persuade themselves that they had burning grievances and that no treaty and no law should stand in the way of the rectification of those grievances. Both Italy and Japan took the wrong way, I should say, and in time it will prove a very disappointing way, of rectifying the present situation.

That is only part of the answer. The other part is stronger sanctions. World-wide economic sanctions, I think, would work in most cases. I may be wrong. The League's experience with Italy suggests that universal economic sanctions, with better technical preparation, could be made really effective, provided that the United States and other hesitant Powers were more willing to take their part.

Mr. JAMES O. MURDOCK. I do not wish to participate in any controversial matter. May I, however, suggest that the first speaker might have mentioned, possibly not as a direct contribution of the United States to international law but as contributing to international order, the part the United States has played in the stabilization of conditions in the Western Hemisphere. The United States adopted a policy in 1823 called the Monroe Doctrine, which has been a very substantial factor in preventing political interference and possibly conquest in the Western Hemisphere in the intervening years.

Chairman WILSON. Does any one wish to say anything on the Monroe doctrine? It is a fertile subject ordinarily in these meetings.

Professor HERBERT WRIGHT. I would like to ask Mr. Moon if he would have the United States participate in stronger sanctions at the risk of violating our treaty obligations with the nations against whom the sanctions might be directed?

Professor MOON. I would hesitate to ask the United States to violate

its treaty obligations by participating in sanctions, but I do most earnestly wish that the State Department would undertake revision of such treaties as now inhibit us from applying economic sanctions. Then we could proceed legally to participate in world-sanctions.

Professor WRIGHT. Would you desire that modification of treaties to extend also to the so-called Bryan Peace Treaties?

Professor MOON. Yes.

Professor MARTIN. May I ask one more question of Professor Moon? He mentioned in one of his points "A stronger League of Nations." By that did he mean the application of sanctions? What form would a strong League take? I think we are all interested now in the future of the League. I wonder if he would elaborate upon that point?

Professor MOON. That is an extremely difficult question which cannot be answered adequately in five minutes. Sanctions are only part of the problem. The League organization might be improved and certain parts of the Covenant can be bettered by revision. That was what I meant—a reformed League of Nations, strengthened by the adhesion of Germany and the United States, and implemented by well worked-out sanctions.

Mr. DURWARD V. SANDIFER. I am also in the mood, Mr. Chairman, for asking Professor Moon a question. The question is whether he would agree, in view of what he says about a stronger League of Nations, that the question of a discussion of the League of Nations in that sense is academic at the present time. I notice a number of writers, some of whom are supposed to be well informed, recently making the statement, on the basis of recent developments, that the League of Nations is now dead and that it is only a question of choosing sides for the next war beginning now and that the choosing will be over by January 1, 1937.

Professor MOON. I may be mistaken, but I think it was President Harding, was it not, who said the League of Nations was dead? And President Harding has passed to his reward. I am not willing to believe that the League is dead until I read tomorrow morning's newspaper. More seriously, it may be said that the League may expire as a result of this present crisis. There is very great danger of that and a very great danger of a European War within the next year or two, and a very great danger we will be drawn into it, regardless of the neutrality legislation that we have adopted. But also there is some faint hope, and I would like to cling to that hope, that the nations will draw back from the abyss, and if they do, there is a real chance that they may be intelligent enough to set to work to improve the League and to assure the continuation of our civilization.

Chairman WILSON. It seems to me that would be a very hopeful note on which to adjourn.

(A motion to adjourn was made, seconded and carried.)

Chairman WILSON. We will adjourn until tomorrow morning at ten o'clock, to meet in this room.

(Adjournment taken at 9:45 o'clock p.m.)

SECOND SESSION

Friday, April 24, 1936, 10 o'clock a.m.

The meeting was called to order by Professor GEORGE GRAFTON WILSON.

Chairman WILSON. You will notice the subject of our program is "International law as a hindrance and as an aid to peaceful change." This morning we are, perhaps, looking at some of the sand that is put into the international machine when we consider international law as a hindrance rather than as an aid to peaceful change.

Professor Yntema, of the University of Michigan Law School, will deliver the address on this subject.

INTERNATIONAL LAW AS A HINDRANCE AND AS AN AID TO PEACEFUL CHANGE

By HESSEL E. YNTEMA

Professor of Law, University of Michigan Law School

The reconciliation of certainty and equity as paramount ends of justice or, in other words, the adaptation of the received legal order to new needs, forms a problem of central interest in recent legal theory. In contrast with the critical attitude of contemporary jurisprudence towards existing law revealed by this interest, the position during a great part of the nineteenth century was somewhat anomalous. On the one hand, reacting against the overconfident rationalism of the preceding Age of Enlightenment, nineteenth century legal doctrine was pervaded by the positivism of the historical and analytical schools of jurisprudence, which emphasized the inevitable derivation of law from national custom and its formal character as the expression of the sovereign will. In consequence, the prevalent theory largely obscured the relations between positive law and social and moral needs. On the other hand, as a matter of historical fact, the nineteenth century was also a period of intensive legislative reform, an era of extensive codification. The anomaly suggested by these concurrent tendencies may be measurably attributed to the then accepted dogma of the separation of powers, which, by setting the enactment and application of law in separate compartments of thought, separately institutionalized, made it feasible in the face of legislative innovation to maintain the comfortable illusions of the stability of law and of the mechanical certainty of the judicial process, illusions which were in fact appropriate to, and had been inherited from, prior rationalistic theories of the nature of law. Thus, the nineteenth century solved the problem of change in law by profuse legislative experimentation but without giving up the fiction of the certainty and completeness of the existing legal order. It was typical

of the Victorian age, officially at least, to ignore the disconcerting facts of life. But the backwardness of legal theory did not preclude progress.

There came a time, however, towards the end of the nineteenth century, when various factors conspired to challenge the sufficiency of the positivistic conception of law. The accumulation of a variety of cultural and economic problems generated by the scientific age produced a critical ferment of ideas, and, despite the efforts which had been made to deal with the more serious types of social maladjustment by legislation, it was felt in various quarters that the ideals of individual liberty and human integrity, for which the revolutions of the seventeenth and eighteenth centuries had been fought, were not to be adequately realized by the mere enactment of rights interpreted in terms of negative policies of economic and political laissez-faire; that, in other words, the attainment of social justice required substantial extension and adaptation of governmental administration as a means of social control. Moreover, the experience with formal legislation as an instrument of change had revealed certain additional difficulties: its tendency to crystallize the development of law in fixed molds and, especially, its invincible imperfections, even when couched in the form of abstract, general codes, or although subjected to repeated amendment, in the face of a changing economy. In short, by the commencement of the twentieth century, the need to justify the adaptation of existing law to emergent conditions could no longer be disguised by legal theory. There had to be not merely significant expansions of administrative law, but account had also to be taken in the administration of justice as such of the problem of change. Thus, in countries where the law has been generally codified, recent juristic theory has stressed the liberal interpretation of statutes; in France, for example, the writings of Geny, Saleilles, Duguit, Josserand, and others, while representing divergent points of view, agree in the emphasis upon the interpretation of law in terms of ideal or social purposes, while in Germany the object of the "free law" school has been to vindicate an area for judicial discretion by exhibiting the existence of "gaps" in the formal law. In common law jurisdictions, there has been a similar reaction against the positivistic undertone of nineteenth century legal doctrine; in the United States, and less conspicuously in Great Britain, the most significant developments in recent legal theory have been concerned with the relations between the formal law, the law in action, and social needs.

It is of no little interest and at any rate inevitable at the present time that the question of the adaptation of existing law to current conditions should be making itself felt in the field of international law. Apart from the pertinence of the developments which have occurred in general legal theory to the solution of international problems, it is apparent that in recent years there have been portentous changes in the international community. For one thing, the same economic and social influences which press for change in municipal law, also affect foreign affairs; the internal political structure of important members of the family of nations has been revolutionized; national

boundaries and colonial spheres of influence have been shifted about; commercial policies have consequently had to be reoriented, unfortunately in these times of uncertainty, too frequently in the direction of nationalistic self-sufficiency. It has become apparent that the industrialized States of the modern world are today more interdependent than was conceivable a century ago, and the apprehension of the liabilities flowing from this situation is poignantly stimulated by the world-wide economic crisis as well as by the ever-present menace of war, which, through universal conscription, economic blockade, and the formidable progress of the military art, affects the security of entire peoples. Upon this background, impelled by the desire for peace, there has occurred in recent times a powerful movement of ideas and a relatively rapid development of international agencies, looking to the pacific determination of international disputes. In the process of readjustment, many novel questions have been presented for solution, and, from various points of view, the adaptation of the existing scheme of international law to modern needs and ideals has been suggested.

In opening this problem of the relation between existing conceptions of international law and changed conditions, it is pertinent to consider at the outset the motives for and the lines taken by, recent criticism. Underlying current discussion is, without doubt, the eminently practical objective to create a reasonable basis for and thus to promote, the establishment of the principle of the comprehensive pacific settlement of international disputes. There are, however, two special considerations, in addition to the realization that incompleteness and inadequacy of legal doctrine leave a corresponding margin ripe for controversy, which are taken to accentuate the importance, for the establishment of such a principle, of the relation between international law and the current needs of the international community. The first of these considerations is a belief that, under present conditions, governments can not reasonably be expected to assent to a comprehensive system of international adjudication without precedent, authoritative formulation of the law to be applied. The second consideration is the supposition, in some degree substantiated by the abortive results of the Hague Codification Conference of 1930, that the absence of normal agencies of international legislation precludes the effective adaptation of international law to modern needs by general codification, and that, in consequence, emphasis must be laid for the time being upon other available means, and, in particular, upon the possibilities of the judicial process, for the necessary formulation of international law. Obviously, this argumentation ends in an *impasse*. For the purpose in hand, its premises need not be examined more closely, although the ensuing discussion will perhaps suggest that the inference sought to be drawn from them, namely, that formal, *a priori* codification is a condition precedent to the desired extension of the rule of international law, is at least theoretically subject to question. Without discounting the importance of the formulation of legal doctrine, it may be noted in passing that neither the supposed limitations of

existing law nor the alleged ineffectualities of present agencies of international legislation would be thought to preclude vesting in appropriate tribunals comprehensive jurisdiction to entertain any international claims, with process to summon, and power to render judgment concluding, all necessary parties, were it not for the fundamental notion that no State is bound either by a rule of law or by the judgment of a tribunal without its consent. This is the basic difficulty, by virtue of which prior codification appears a condition precedent to extension of jurisdiction and as a practical result of which the condition is denied accomplishment. Such a *liberum veto*, it is palpable, is sufficient to paralyze any legislative machinery. It is pertinent to add, in view of the experience in municipal law, that formal codification of legal doctrine is not without inherent difficulties, and that at best the assurance which it can give is likely to be limited, temporary, and more or less illusory. From this point of view, the discouragement which has recently been given to the movement to codify the existing law of nations may perhaps prove a blessing in disguise. The result may be to cause the assumption that prior formal statement of law is essential to the establishment of jurisdiction to be discarded.

It will be observed that the train of argument to which attention has just been directed rests in the last analysis upon a showing that, in material respects, the existing doctrines of international law are inadequate for the determination of controversies between States in conformity with modern needs. This issue obviously involves a wide range of inquiry, and it is here possible to refer only to a few of the more obvious lines taken by recent criticism. What is initially to be remarked is that the most substantial and effective evidence of immaturity in current doctrines of international law is provided by comparative jurisprudence, by analogy to the experience reflected in the more advanced systems of municipal law. By reference to this standard, emphasis is in recent discussion diverted from the apologetic effort by formal definition to justify international law as law to the more pregnant question whether prevailing conceptions conform to ideals of justice indicated by legal history and general jurisprudence. Obviously, the argument has limitations; as Lord Mansfield once observed, there is nothing in law so misleading as a metaphor or an analogy. But it would seem that in the present case, subject to necessary qualifications, the comparison is valid. Historically, the doctrines of international law have been derived from and have developed in consonance with, the legal conceptions generally prevailing from time to time. And, ultimately, the purpose of international law as of all positive law is to regulate human conduct in accordance with accepted standards of justice. It follows that general legal experience, as indicated by comparison, is of primary significance in the critique of existing international law.

From a comparative point of view, measured by the standards of municipal law, it is incontrovertible that the prevailing conceptions of international law are in material respects anomalous. Indeed, it is not necessary to go beyond the first postulate of the doctrinal structure to discover difficulty.

International law is commonly conceived as a body of law governing the relations of sovereign States or, in other words, of entities endowed among other things with the supreme power of legislation. Therefore, although perhaps regarded as subject to natural justice, they are deemed bound by positive law only so far as they consent. This mode of thought, which has been perpetuated in the dogma of sovereignty, it may be recalled, originated in the sixteenth century to vindicate the independence of national States, then emerging, as against the predominant claims of the Holy Roman Empire, and at the same time to justify the prevailing trend of absolutism in government. In modern constitutional government, even in its totalitarian aberrations, this notion of the ultimate irresponsibility of the legal subject has become a mere fiction, save for certain unfortunate vestiges in public law, but its survival as a measure of the obligations of States in the sphere of international law, by which their conduct is sought to be controlled, is an inherent anomaly in the very conception of the international legal order. From this premise come the notion of the immunity of the sovereign from the ordinary operation of law, the highly inequitable principle, enshrined in both municipal and international law, that no individual has any rights against a State save by its grace, as well as the anarchic idea that the sole basis of international obligation is consent.

Or consider a related doctrine, the insistence upon which is doubtless due to the fact that it is a veritable *tabula in naufragio* in the midst of uncertainty, namely, the uncompromising interpretation of the principle *pacta sunt servanda*. It is unnecessary to explain that this principle of the obligation of contracts was accepted at an early stage in the evolution of law, but the literal application of the maxim pertains to a primitive era of jurisprudence when, partly owing to defective means of proof, only formal contracts were recognized and these strictly enforced. But it was centuries ago that the Roman jurists introduced the universally accepted conceptions of intention and good faith as criteria for the construction and enforcement of contracts, and, as Papinian observed, preserved through the *exceptio doli* anyone who had an equitable defence from his liability to action under the formal law. (*Qui aequitate defensionis infringere actionem potest, doli exceptione tutus est*. D. 44. 4. 12). In consequence, specific equitable grounds, such as fraud, mistake, duress, impossibility of performance, failure of consideration, and the like, have with substantial uniformity been accepted in municipal jurisprudence as sufficient answers to claims based upon the literal obligation of contracts or, in certain types of cases where justice so requires, as independent grounds of action. It is true that, in the case of international engagements, the problem of equitable interpretation is minimized in most instances by the insertion in treaties of clauses providing for a brief term of duration or for unilateral denunciation. But it is also noteworthy that the appeal to the sacred obligation of treaties is most apt to be heard with respect to those treaties, purporting to be permanent, which were imposed by force

or threat of arms, or in other words by duress, and which therefore appear subject to exception under ordinary principles of municipal law.

Or, to take a third and more specific illustration of uncertainty and inadequacy in existing doctrine, reference may be made to the principle of marginal waters and the related conception of the freedom of the seas. Admittedly, it is desirable to define a limit, set in the open sea at or within a prescribed distance from the coast, sufficient to protect the interest of the coastal State under normal conditions, and circumscribing the extent of its ordinary territorial jurisdiction. What is significant of the state of international law in this connection, however, is the variety of views with respect to both the permissible distance and the nature of the jurisdiction exercised within marginal waters, as disclosed, for example, in 1930 at the Hague Codification Conference by the failure of the conference to reach agreement on these primary questions. Apart from this circumstance, it is difficult to perceive, from the viewpoint of juristic analysis and more especially in the face of the historic practices of nations, why the fixation of a limit for the exercise of general jurisdiction within a limited coastal area on the high seas should involve the inference, which has often been confidently asserted in influential quarters, that logically beyond the limit there can be no jurisdiction for special purposes but only a sort of legal vacuum, an asylum for slave-trading, smuggling, rum-running, exhaustion of the natural resources of the sea, and indeed almost any activity short of piracy not prohibited by the law of the flag, irrespective of the outraged interests of littoral States. Assuredly, this unnecessary inference is inconsistent with the conception, long since settled, that the open sea is not a *res nullius* open to appropriation, but a *res communis*, the common jurisdiction of all nations. It may be thought that, as such, its user should comport with the needs of the international community and the legitimate interest of individual States, and that, conversely, to quote Lord Cockburn, "the right of a state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws," irrespective of the three-mile distance, is well founded.[1]

It would be impertinent to the present purpose to pursue this part of the inquiry further, since the illustrations which have been adduced will serve to suggest that, from a comparative point of view, prevalent doctrines of more or less consequence in international law are open to question. In general, it may be suggested that the doctrinal anomalies in international law as elsewhere take the form of, first, uncertainty arising from inconsistent or confused theories, second, survivals of institutions and ideas maladjusted to modern needs and, third, *lacunae* in the application of general principles to new types of situations. This last difficulty, lack of specificity, is a universal problem of jurisprudence, which is presumably inherent in the circumstances to which international law is addressed. At least in the most frequent type of situation, in which claims are being prosecuted by a State on behalf of

[1] Queen *v.* Keyn (1876), L. R. 2 Exch. Div. 63, 214.

private interests and which may therefore involve one or another of the myriad possible forms of international intercourse, it is unreasonable to contemplate that each such situation should be anticipated by a particularized rule of law. Ordinarily, it will be sufficient to provide general principles and an appropriate procedure for the settlement of such claims. On the other hand, the prejudicial survivals and theoretical antinomies in the general principles themselves raise issues as to how they are to be remedied.

Upon this question of the remedy for the problem of change in international law, such unanimity as exists among contemporary critics of current doctrine is dissipated by divergence of views. Reference may briefly be made to three suggested solutions. An emphasis, which until recently has properly absorbed attention, has been upon conciliation and arbitration as the best methods for the orderly determination of international conflicts or, in other words, upon the creation of appropriate institutions and procedure. In substantial measure, this primary objective may be said to be accomplished. It is to be remarked, however, that emphasis upon the mere means of settlement neither prejudices nor throws light upon the law to be applied, nor does it show a persuasive basis for an inclusive obligation to resort to the methods advocated. At the same time, as will be indicated in a moment, there is historical justification for a fiction to ignore the problem of change in law for the purposes of the formal, if not the scientific, theory of adjudication.

A second solution to be noticed proposes to solve the problem of change in international law by the recognition, alongside of positive international law, of an international equity, administered either by independent tribunals or concurrently with the ordinary law. The basis for this suggestion is the supposition that nations may be expected, in view of the limitations of existing international law, to submit certain types of disputes which would otherwise be considered nonjusticiable, for determination *ex bono et aequo* or, in other words, in accordance with general principles of equity and objective justice, which may or may not correspond with positive law. It will be noted that a starting-point for such a development now exists in Article 38 of the Statute of the Permanent Court of International Justice and in Article 28 of the General Act of Geneva. There are, however, two fundamental considerations which suggest that this method of adapting international law to existing requirements will be justified only by necessity. In the first place, in both the Roman and English systems of law, the development, in the one case, of the *ius gentium* and, in the other, of equity, to supplement, ameliorate, and correct an inadequate prior system of legal remedies, was occasioned by the facts, first, that the original system so liberalized was a system of *remedies* formally defined by a limited number of specific forms of action, the *legis actiones* or writs, which under requirement of law had to be strictly interpreted, and, second, in the English law, that the common law courts for a time failed to modify the more primitive system of writs by the admission of equitable defences or remedies as was done by the Roman praetors. In the

sphere of international law, these conditions do not exist; there is neither the limitation of law to forms of action nor a constitutional incompetence of international tribunals precluding the equitable interpretation of positive law. To one who reflects upon the long struggle which has been made in Anglo-American jurisdictions to surmount the difficulties attendant upon the historical separation of law and equity, the proposed differentiation of an equitable jurisdiction must appear gratuitous in the existing situation. Such justification as it has is the prevalence of positivistic conceptions of international law as a kind of strict law, not controlled by equitable principles, a situation of which unfortunately account must be taken, and the possibility that in unusual circumstances a reference to international equity may be useful. In the second place, the argument for the recognition of an equitable jurisdiction in international law implicitly concedes the vital point that certain categories of international disputes are nonjusticiable under the ordinary principles of law. In view of these considerations, the proposal to solve the problem of change in international law by duplication of law, possibly attended by duplication of courts, must be regarded as a *pis aller*.

This brings into view a third solution, most cogently advocated by Lauterpacht, a solution which, in order to justify the postulate of the justiciability of all international disputes according to law, proposes the widest possible extension of modern judicial interpretation as the most effective means now available to adapt existing law to existing needs. For the purpose in hand, the postulate itself, the demonstration of which is one of the most significant recent contributions to the theory of international law, may be assumed, and attention directed to the basis shown for equitable interpretation of international law by international tribunals. The basis is a three-fold comparison: first, by reference to modern conceptions of the judicial process; second, by adducing the doctrine of abuse of rights; third, by resurrecting the *clausula rebus sic stantibus*. For reasons which have been intimated, this argument, regarded as a scientific analysis of the judicial process as requiring creative extension of law to novel cases, is in general to be accepted. In detail, however, it is subject to two reflections.

In the first place, the doctrine of abuse of rights and the theory of changed conditions as a principle of equitable interpretation, at least from a comparative point of view, are of limited value, and for this reason the argument to some may seem less acceptable by reason of their incorporation. The first of these doctrines is quite controversial and has been most thoroughly ventilated in the French *doctrine*. According to one theory, abuse of rights includes only cases of malicious exercise of rights, a conception which, as the discussion of war-guilt will attest, is not easily transferable to international disputes. Wider conceptions defining the term so as to include abnormal exercise of rights or to signify relativity of rights to social purposes, are predicated upon the necessity of liberal interpretation of codified law, a necessity which, in the case of international law, is minimized by the circumstance that it is not codified. Moreover, as Anglo-American law will suggest,

the broad conception of abuse of rights is not essential to justify a flexible application of general principles to concrete cases. Similar observations may be made as to the doctrine of the *clausula rebus sic stantibus*, which, as Kaufmann's monograph may be thought to demonstrate, is susceptible of a construction ultimately negating the obligation of legal engagements. In any event, the notion of change in conditions as a principle of equitable interpretation of legal transactions, which has attracted much attention in recent jurisprudence, is accepted in municipal law only in terms of limited and specific categories, such as *imprévision*, supervening impossibility of performance, failure of consideration, and the like, and for this reason is scarcely admissible as a general principle of construction. In short, both the doctrine of abuse of rights and the *clausula rebus sic stantibus* represent controverted, ill-defined general ideas, which are intended to limit the scope of rights conferred by positive law through judicial discretion without indicating a specific standard by which discretion is to be guided and without affording a constructive basis of solution. Their usefulness will depend upon more specific delimitation in terms of the interests involved in particular types of cases.

The second reflection is the paradoxical possibility that, in an environment where there may be apprehension as to avowed judicial legislation, a fiction may be beneficent or, more frankly, it may be advantageous, so far as the formal theory of international adjudication is concerned, to obviate the problem of change in international law by definition by assuming that a system of legal ideas, rooted in natural justice as well as in international customs and conventions, includes within itself the principle of equitable adaptation. At least this may be said in defence of this position, that one of the most curious phenomena in the history of both Roman and English law is the apparent conservatism of legal tradition, the belief that the courts were declaring a pre-existent body of doctrine, largely unformulated, which prevailed during periods when they were accomplishing the most profound changes in the legal order with only occasional benefit of legislation. There is indication that an analogous phenomenon is transpiring in the field of international law today. Courts, especially international tribunals, are on the firing-line of public criticism, and for this reason they may as a rule be confidently expected, in the light of their time, to decide the controversies submitted to them as justly and as fairly as they can. A fiction that in the process law is merely declared, while not completely realistic, will not preclude and under sensitive circumstances will presumably facilitate the equitable interpretation of law according to prevailing conceptions of what is just.

This does not signify that there is no place for constructive criticism. From a comparative point of view, the present system of international law embodies various anomalies, in specific doctrines as well as in its theory of obligation and sanction. To refer in conclusion to another means for dealing with this situation, it may be suggested that comparative legal history gives powerful evidence of the service of legal scholarship in the creation of new

law for new conditions. The Roman law of the golden age of the early empire was substantially the product of jurisconsults; the modern civil law is based upon the treatises of a long succession of legal scholars; in our own law, since the time of Story and Kent, the most important source of legal doctrine has been text-books. Nowhere has the influence of scholarship been more conspicuous or the formation of learned opinion more significant than in the field of international law. Recently, a distinguished statesman intimated that the problem as to international law resembles that of naval disarmament in that the chief difficulty is with the experts. So long as the professors of international law and the legal counsel of the foreign offices believe that international law is constituted by a mechanical formulation of narrowly defined customs, without equity and without the principle of adaptation to modern conditions; that States are ultimately irresponsible in their mutual relations; that there is no international obligation without consent; that certain types of international disputes are nonjusticiable; that reprisals and war are legal methods of dealing with such disputes; that, to anticipate the future perhaps, what is gained by the sword or by threats may be held by law until the conquest is cured by prescription: so will be the law, and it will not be for a court of arbitration to say the contrary. As we are told by the poet, belief is the soul of fact. The reference is not to individual views but to general opinion, which is a vital element in the slow process of the adaptation of law. If this be true, it may perhaps be recommended to you that an essential method to solve the problem of change in international law is to demonstrate, with the utmost conviction of exhaustive scholarly research, the particular ways in which the existing legal order should be changed.

Chairman Wilson. The discussion will be opened by Mr. Sanford Schwarz, formerly with the American Agency, General Claims Arbitration, United States and Mexico. These are ten minute discussions.

Mr. Sanford Schwarz. Professor Yntema's paper has left me with very little to say. The question, as he has indicated, is an exceedingly difficult one, and involves, as he said, a very wide range of inquiry. In the few minutes I have, instead of registering agreement or disagreement, I would like to make some supplementary remarks.

The facts of political life which international law assumes and interprets change constantly. Since the seventeenth and eighteenth centuries, when the doctrines of international law received their classical formulation, the facts by which those doctrines were inspired have suffered many transformations. Despite repeated efforts to freeze the *status quo*, efforts formal and informal which have usually followed major wars, those fundamental changes continue.

It is unfortunately true that international law has not kept pace with these alterations. In the face of the pressing necessities for territorial and economic redistribution, and the demands of less favored States for an altera-

tion in the world régime, a redistribution which must be effected peacefully if civilization is to survive, but which will come about whether peacefully or otherwise, we are confronted by the fact that international law which, in any peaceful scheme, must play an increasingly important part in the processes of change, is inadequate.

Professor Yntema has indicated something of the part that general jurisprudential method can play in the development of international law into a satisfactory instrument for the government of world relations in so far as these are susceptible of government by law. The present chaos in the world's affairs is not attributable in any substantial measure to the deficiencies of legal principle. I will not be so rash as to seek here to indicate what is at the root of the difficulty. Nationalism, imperialism, economic inequality, dictatorship, and all the rest, these words are merely descriptive terms, symptomatic of world dislocation. It is important, however, to understand that, at least in a world of sovereign States, the creation of an effective legal instrument imports agreement upon a minimum of economic, social and political fundamentals. I see no prospect of it, but only upon that basis can a true legal order exist.

In a most vague and general way it is possible to indicate what the necessary postulates of an effective international law are. First, the recognition that world life is transnational; second, that it is a process of growth and also, be it said, of decay; and third, that the legal order must be conceived of as a process and not as a condition.

These postulates have for long been accorded formal and substantial recognition, formal recognition by the writers and substantial recognition by States. The Concert of Europe and the League of Nations today evidence that. Every writer upon international law makes use of the term "family of nations." Unfortunately, however, writers have refused to concern themselves with the question of what the law ought to be in order that that family might prosper. With the discrediting of the methods of the law of nature school, international lawyers came to regard their discipline as a non-normative science. That attitude characterizes the profession today. The principal obstacle to change which international law at present offers is in the mechanistic philosophy inherited from the last century, with its corollary methods of exhaustive analysis of State practice conceived at once as the exclusive source and end of law. It was that philosophy which brought about the excessive preoccupation with the formulation of a satisfactory theory of the source of legal obligation. To date no satisfactory theory has been propounded, and it seems unlikely that one can be found. In the present state of things it hardly seems worth while to continue in that direction.

Like the cat which, put out at the door comes back by the window, international lawyers have not been able to rid themselves of the supposed incubus of natural law. It is perhaps a conspicuously useless speculation but of interest nevertheless to wonder whether Grotius would recognize in the frequent

present day derivation from the right of independence of all the remaining principles of international law the work of brother initiates in the mysteries. If the eighteenth century was too rationalistic for our taste, the answer of a Louis Quinze philosopher might be that our doctrinaires are equally rationalistic but not quite as reasonable. For while the doctrines of Grotius, and more especially the ends at which he aimed, were transnational, contemporary doctrine stands to the State in the same relation in the legal sphere that nationalism bears in the political. Consent of States, sovereignty or independence, jurisdiction, all these represent the justification of national practice and show little alleviation calculated upon the necessities of international intercourse. Clearly these dogmas cannot be entirely scrapped; only uninformed zeal looks forward to the establishment of a World State. But doctrine which has been so resourceful in the municipal sphere, making elaborate and socially beneficial use of fictions, might well make similar use of pertinent make-believe to indicate what the ideal legal order should and would be and thus to influence the established one.

Much more could be said. I hope much more will be said. The principal preoccupation of international lawyers in dealing with change has been with change in the law rather than with change in conditions. Consequently there has been a great preoccupation with the difference between justiciable and non-justiciable disputes. And it seems to me a great part of the controversy must necessarily continue to focus upon that distinction, not because it is itself a valid one within the sphere of law, but because at the core of it there is an indication that there is a difference between those problems which may properly be regulated by judges, those problems for the solution of which we may depend upon the gradual growth of the law or the change of the law or the process of the law, and those problems which are so far political, which so far involve matters not subject to the regulation of principle or of principle as modified by the judicial conception of expediency that no State, and for that matter, no international community, can consent to refer them to the adjudication of a tribunal.

Chairman WILSON. The discussion will be further continued by A. A. Roden, Assistant Professor of History and Government, Denison University.

Professor A. A. RODEN. Mr. Chairman, fellow members: My only function here is to start discussion; so I will make just a few general remarks. Perhaps it does not mean much, coming from one so young in the subject as I happen to be, but I do want to say a word in appreciation of the paper we have been listening to by Professor Yntema. It was one of the best I have ever heard on this subject, in its thorough analysis, and in the wealth of legal experience that its author has brought to us from the field of municipal law. I think we can do a tremendous job for the science of international law by going along this line, as mapped out for us by Lauterpacht, for instance, in his book, *Private Law Sources and Analogies of International Law.*

There were three parts to the talk which stood out in my mind. (I was called to the phone for a time, so I do not know if I got it all.) The first is the dilemma which certain foreign offices and the codification school have reached; second, the three "anomalies" of international law—I believe that is Mr. Yntema's word—and finally, the three suggested ways out.

We might perhaps have anticipated a little the lack of feeling of disillusionment which Professor Yntema had over the check given to the codification efforts at The Hague in 1930. He is one of the leaders of what might be called the realistic school of jurisprudence in the United States today. While I could not say he has been an active opponent of the efforts of the American Law Institute to "restate" the Common Law, even there he is not on the band wagon.

His point is well taken, though. It has only been in advanced legal systems, where there have been several centuries of decided cases, particularly in the Roman and English systems (and he might also have given the French system where the diverse *coutumes* were brought together and some system made out of them, with the help of the Roman code, under Napoleon), where codification has seemed necessary. It is usually in the more advanced systems, where there is a certain chaotic prolixity of decisions, that there is need for some order, and a codification effort is most useful and successful.

Passing to the three anomalies of the international legal system at the present time. The first is the anomaly of sovereignty, the idea of international law being based upon the will of the States whom it is meant to regulate. Concerning this one, as well as the two others, I would be able to say in a general way that I agree completely with the cause of the disillusionment in many parts. There is a conflict between theory and practice. But it seems to me our job as scientists is not so much disillusionment or overoptimism. What we need to do is to go to work,—theory as well as practice must be reconciled. The practice of States to which Mr. Schwarz referred may not be as bad as some think.

It would startle some people, I suppose, if one would say outright that a provision of the American constitutional law could be set aside by international law. Yet perhaps there might be found such a provision which has been set aside in practice. Let me indicate something of the sort I mean, an illustration of the way the practice of States is rendering inadequate the "sovereign will basis" of international law.

Congress was given the right under the Constitution of the United States to grant letters of marque and reprisal. Letters of marque and privateering were outlawed by the Paris agreement of 1856; but we never agreed to that. Perhaps somebody can set me right if I am wrong; but so far as I know we never agreed. We did not at that time and have never since agreed to the outlawing of privateering, so that under the "sovereign will" theory we would not be bound. Yet ever since that conference the United States has refrained from granting letters of marque. I presume it would be unthinkable for the

State Department or for Congress or for any other one to suggest at this time the United States would still do such a thing. Hence I wonder if it can not be said that we have here a provision of constitutional law which has been rendered inoperative by international practice and international law.

The second anomaly, the alleged rigid adherence to *pacta sunt servanda*, —well, we just have to glance at the practice of States. Here at once you find the conflicting principles. And apparently there is an acquiescence on the part of States to treaty changes of the sort that we all know go on. I listened last night with a great deal of interest to the paper which was read by Professor Moon. It is amazing to recall the number of ways in which inequities of the Treaty of Versailles have been set aside in practice. The same is true of the law of the territorial sea. The very difficulty of getting general acceptance of Bynkershoek's simple rule on the limit of the territorial sea comes from the fact that it is too simple. The States are already following the wider conception that Professor Yntema tells us the lawyers should be following. It is too precise, that is, our notion of the three-mile sea area. So much for the three anomalies.

There were also three ways out, in this matter of providing for peaceful change. The first was conciliation and arbitration. Professor Yntema dismissed that with a very few words. The proposing of agencies for settling disputes does not give much light on the law which the tribunals will apply. My only comment is that in practice the States often indicate in their *compromis* something about the substantive law their court is going to apply; witness the Alabama Claims and the provisions of the General Arbitration Act. It may be too that a study of the work of such bodies as the Conference of Ambassadors in emergency cases might reveal principles necessary for the maintenance of peace where reprisals by a strong Power might lead to a loss of territory or war.

It is difficult to predict what the practice of States will be. Where recognition of change in legal relationships seems needed, it may be that conciliators and arbitrators may come to be recognized as having more power of "loose" or equitable construction than adjudicators. One bit of evidence in support of such a tendency is seen in the wording of the General Arbitration Act. There the Permanent Court has not been given the power to make use of the *ex aequo et bono* clause as a normal feature of its jurisprudence. Only the special tribunals are given it. It may be in point to add here, however, that I see no good reason for the distinction as yet. This is from one who had the privilege of studying under the Belgian author of the Act, the distinguished young Professor Henri Rolin, at the University of Brussels.

The second way out is suggested at once by the reference to the *ex aequo et bono* clause, the possibility of building up a body of equity law. The origin of the clause in the Statute of the Permanent Court does not give much aid to such a power on the part of the court. The author was a Frenchman, then representing his country at Geneva. A young researcher in this field happened to write a letter to the man, now on the court itself, Judge Fro-

mageot, asking about this possibility. I think Professor Yntema might like to read the letter. I have it in my desk. Professor Fromageot says his idea was simply this. There is the possibility in French jurisprudence of handing down a *jugement ou arrêt d'accord*, in some ways similar to our "agreed case" or "special verdict," in a case which might possibly stir up useless political or religious controversies, for instance. Fromageot felt that the World Court should have such a power. The parties reaching an agreement would simply have this rendered as of law with no opinion given—rather a narrower interpretation than is usually held concerning the effect of an *ex aequo et bono* clause!

I am wondering if the practice of States is not going beyond both Fromageot and Professor Yntema here, however. Max Habicht had an interesting series of lectures at the Hague Academy a year ago last summer on the meaning of the *ex aequo et bono* clauses. He was able to point out from his studies that, with their growing use, States are making a possible place for the growth of a body of equity law along side the body of "strict" law. He is led to the conclusion that a judge could make use of them to set aside the letter of the law if the spirit would otherwise be defeated.

Whether the growth of this body of equitable principles be alongside or inside the main body of law does not make so much difference, it seems to me. The point is we need it. So you can see why I hail with enthusiasm Professor Yntema's final suggestion. The suggestion is that we adopt the "fiction" that international law contains in itself the principles necessary for the decision of every case. I would like to present this as a question by which we might open up the discussion. Think over the various disputes which are disturbing the peaceful relations of States. Are there any which legal methods and materials could not resolve? If we ourselves are agreed that what Professor Yntema as a realist must call a fiction is true for existing cases, what right have we to take any positive stand that it would not be true in other cases which have not come up?

Chairman WILSON. It seems to me that it is a very good plan, when the chief is away, to give a chance to all of the subordinates to appear. Therefore, I am going to ask Mr. Butler to take the chair and I will take his.

(Mr. CHARLES HENRY BUTLER now presiding.)

Chairman BUTLER. The program gives us ten minutes for short discussions before we take up the next subject. I take it this is limited to five minutes for anyone who wishes to avail himself of the opportunity.

Mr. BENJAMIN AKZIN. I feel like trying to rescue the subject of this morning's meeting from the two leaders of the discussion. If I am not mistaken, the subject is that of "International Law as a hindrance and as an aid to peaceful change." It might appear to be an entirely rhetorical question if it were not for the many discussions within recent years of the unfortunate rôle of the so-called static international law as a hindrance, a hindrance to

peaceful change, a hindrance to progress and a hindrance to almost anything.

I would like to make it clear that the alternative of international law is not a peaceful change. Even if international law is in a static and a very unsatisfactory state and takes no notice of equitable exigencies of the situation, in the absence of this static international law the alternative would certainly not be peaceful change. It might be change, but a change very far from peaceful. It may be said, therefore,—and all of the critics of the static international law ought to be reminded of it—that even this international law, with all its limitations and defects, is a powerful factor in the maintenance of peace. While there is peace there may be a chance for peaceful change. If there is no peace, there is no chance for peaceful change.

However, all of us realize lately that international law has to be supplemented so as to be put more directly into the service of necessary peaceful change and of equitable adaptation. Professor Yntema has discussed the methods of amending and supplementing international law so as to adapt it better for its task of promoting peaceful change. And it is this subject which I would like to bring back to this audience after the digressions of the two leaders of the discussion.

States have a queer way of not always agreeing even on the straight, formal and non-equitable rules of law. I am afraid it will be even harder to get the States today to agree on changes which will be necessarily equitable in character. The celebrated principle of *ex aequo et bono* will not help us unless the parties agree to its application. Heretofore, such agreement was not so easily achieved.

As for the substantive rules of objective justice or of a natural or reasonable law of nations, to be applied in our equitable or dynamic law of nations, I am afraid that these rules are conceived and interpreted in a very widely divergent fashion by the various States and by the various interests involved. These rules would have far less of a chance of being adopted as binding and as authoritative by the States than even the static international law of today, from which States are occasionally found to depart.

Last night Professor Moon showed us how great is the divergence of attitudes and opinions once States begin to plead in the name of equity. The arguments used by various parties are very interesting and are very meritorious, but, as we heard from him yesterday, they will not give us a greater degree of certainty. If we cannot, therefore, start by reforming the States, I believe that Professor Yntema has suggested the only line of approach open to us, at the present time, and that is to try to agree upon some criterion which might rally the members of the profession. It would be very well for us to try here to set our minds on the necessity and the possibility of getting a certain accord as to standards to be used in the upbuilding of an equitable international law.

Mr. WILLARD B. COWLES. It seems to me that in the marginal and changing field between justiciable and non-justiciable disputes, international

tribunals have a legitimate opportunity to aid peaceful change through a judicious use of the method of jurisprudence.

When situations arise which do not fit into old molds, practitioners and international tribunals are usually able to find acceptable solutions, and it is not unusual that the first important evidence of a proposition of international law appears as a holding in an international adjudication. Though perhaps not altogether within one of the orthodox theories of consent, States tend to accept legal propositions laid down by international courts even where little evidence of consent existed antedating the holding. Such lack of evidence of antecedent consent will not usually deter an Agent, in a later arbitration, from citing such a holding as an impressive evidence of the law if it supports his case, nor will the fact that antecedent evidence was lacking, prior to the first holding, always deter a later international tribunal from following an earlier holding. For instance, before the decision in the Pious Fund Case [1] the available evidence of a consensus that the rule of *res adjudicata* was applicable to arbitral awards was apparently quite small, yet that rule is now generally accepted and has been applied by the Permanent Court of International Justice in several cases.[2]

There would appear to be few international cases where any attempt has been made to reverse a previous one. Once a proposition of law has been enunciated and applied by an international tribunal, it is not likely to be opened *de novo* but treated thereafter by other international courts in much the same manner as is a precedent at common law, and this would seem to be especially true where the earlier holding will aid a later equitable result. In international as in private jurisprudence the rule *stare decisis* would seem to be the working rule of the law.

The Supreme Court of the United States, by Justice Cardozo, has recently observed that international law has a twilight existence during which it is hardly distinguishable from morality or justice till at length the *imprimatur* of a court attests its jural quality,[3] and Maine has said that international law obtained authority in a great part of Europe through the same process by which the Roman law obtained authority over very much of the same part of the world.[4] If these statements are correct, the application of the method of jurisprudence by national and international tribunals would appear to be sanctioned by international practice and it seems clear that in the past international tribunals have played a large part in the development of the body of international law which States have accepted.

[1] United States *v.* Mexico, For. Rels. of U. S., 1902, App. II, pp. 15–18; American Journal of International Law, Vol. 2 (1908), 898–902.

[2] See The Chorzow Factory, Judgment No. 13, Series A, No. 17, Series A/B, No. 32, 1 Hudson, World Court Rep. 646, 664; and Advisory Opinion No. 11, The Polish Postal Service in the Free City of Danzig, Series B, No. 11, Series A/B, No. 15, 1 Hudson, World Court Rep. 440, 459.

[3] New Jersey *v.* Delaware (1933), 291 U. S. 361, 383–384.

[4] International Law, p. 26.

The United States Supreme Court has been bold in an analogous situation in taking jurisdiction and developing the substantive law governing the States of the United States in their mutual relations. About a hundred years ago Daniel Webster came before that court, as a counsel for the defense, in the case of Rhode Island *v.* Massachusetts, one of the early cases in which the original jurisdiction of the Supreme Court was invoked in connection with controversies between the States involving a boundary dispute.[5] On a special plea to the jurisdiction, Webster argued that the Supreme Court had no power to adjudicate a case which involved political matters, and the Attorney General of Massachusetts argued that if the court took jurisdiction it would have no substantive law to apply. Article III, Section 2, of the Constitution simply says that the court has original jurisdiction to decide cases and controversies between the States. There neither was nor is an implementing act setting up a body of substantive law to be applied in such cases. Despite this fact and the arguments of counsel, the court overruled both arguments and went on to the merits of the case. Since that time, in a number of cases involving the States of the United States, the Supreme Court has said that it could apply international law, the common law, or principles of equity and justice, apparently regarding the States as having consented to a broad principle which includes these by implication.

The Supreme Court, as is well known, has developed in those cases an interesting body of Federal common law which consists of a mixture of common law and international law, and those cases show that, while the court has often said that international law is a part of the common law, it has acted, in a number of cases, as though the converse of the proposition were equally true, as for example, in the case of Kansas *v.* Colorado,[6] which involved the water rights of both States on the Colorado River, where, expressly noting that it was sitting as an "international court," it held that the doctrine of reasonable user was applicable.

Before the opinion was handed down in the Pious Fund Case, did the foreign offices of the world know that they had consented to the proposition for which that case is now cited? It seems doubtful that they would object now. Foreign offices do not assert generally that every specific proposition of international law is known and that no new proposition can be implied by international tribunals based upon a consent to more general propositions. It is doubtful if any foreign office would or could furnish an exhaustive catalogue of the legal propositions governing States *inter se* to which it would object if handed down by a national or international tribunal. Moreover, as new propositions have been laid from time to time by international courts in the past, the foreign offices concerned, as well as later international tribunals, have generally accepted them. Indeed, foreign offices even use such precedents to rationalize protests against action or negligent inaction of other governments.

Only an extremely small minority of international awards have been

[5] (1838) 12 Pet. 657, 755; (1840) 14 Pet. 210. [6] (1907) 206 U. S. 46.

protested. Compared even with the number of cases where international tribunals have applied principles of private law, there are few instances where such decisions have been contested on the ground that private law was inapplicable. The psychology of this is not complex. After having agreed in a *compromis* to comply with an award made in an arbitration, to refuse to do so on the ground that a proposition was enunciated therein which was improper, might be deemed by the other party as a mere rationalization for not carrying out the decision. This would seem to be especially true where a just and equitable decision has been handed down. When an issue has once been settled in such a manner, the attitude of the foreign offices concerned is likely to be that an old question should not be reopened. It may be a serious matter for a State to refuse to accept an arbitral award made by judges of the highest reputation and character, and the practical exigencies of international relations at the time may be conducive to the acceptance of such a holding, as were the national conditions when Marshall first boldly enunciated the doctrine of judicial review in Marbury *v.* Madison.

While it is obvious that an international judge must not abuse his function, that he must stay within the terms of the relevant controlling treaty or statute, that he must not decide in an arbitrary manner unrelated to principle, that he must avoid confusing what the law is with what it ought to be, yet this does not mean that he must take an extremely restricted view of his duty. It would seem to be the characteristic mark of the great judge that he is not only willing to develop the law where it is necessary and proper, but is willing to admit that to do so is an essential function of the judicial process. An acute judicious sense, such as exemplified by Chief Justice Marshall in Marbury *v.* Madison and Chief Justice Hughes in the Guatemalan-Honduras boundary dispute, would seem to be the legitimate middle ground.

To sum up, it seems to me that international practice indicates that there is a general consensus among States that those charged with the decision of international cases may use a method of jurisprudence similar to that applied by municipal tribunals; and, so long as the application proceeds upon sound reasoning even from broad legal principles, no reason is perceived why this method should not be applied in the marginal field where it is arguable whether the question at issue is of a legal or a political nature. Certain questions in the Alabama Claims, and those in boundary disputes generally, have been settled by arbitration though deemed political. The Supreme Court of the United States has successfully transformed political questions into justiciable ones, notwithstanding the fact that a century ago that court was repeatedly told that it had no jurisdiction over such issues and that there was no substantive law it could apply. That court is building up a system of substantive law based upon corollaries and deductions apparently from implied consent by the States to general principles. And, reminiscent of Holland's *dictum* that international law is an application to political communities of those legal ideas which were originally applied to the relations of individuals,

in so doing, the Supreme Court has, by and large, applied standards in cases between the States similar to those applicable between private persons in parallel situations.

If Dean Pound is correct that law is the unfolding of ideas, then, where the law is under-developed, there would seem to be a duty upon international judges not only to declare the law as it was, but cautiously to expound it as it is, in the light of old or new principles as related to the fact-situations presented to them. The acceptance of such a duty by international judges has aided peaceful change of territory in the past—*jus* has become *lex* by their *imprimatur*.

In the light of past international practice employing the method of jurisprudence, the present general refusal of States to recognize Manchukuo, and the fact that the detailed content of what is implied in the acceptance by States of broad rules or principles would not seem to be comprehensively known in advance by anyone, is it probable that States generally would protest a holding of the Permanent Court, if an appropriate case could be brought before it, that it was implied in the League Covenant or in the Pact of Paris that conquest by force now constitutes internationally illegal action? [7]

Chairman BUTLER. The next subject for discussion is "Article 19 of the League Covenant and the doctrine of *rebus sic stantibus*." Mr. Quincy Wright, Professor of International Law, University of Chicago, will be recognized for twenty minutes.

ARTICLE 19 OF THE LEAGUE COVENANT AND THE DOCTRINE "REBUS SIC STANTIBUS"

By QUINCY WRIGHT

Professor of International Law, University of Chicago

Sir Henry Maine gave happy expression to a commonly accepted truth when he wrote,

> With respect to progressive societies it may be laid down that social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happi-

[7] Art. 5 of the Budapest Articles of Interpretation of the Briand-Kellogg Pact of Paris made by the International Law Association in 1934 reads: "The signatory States are not entitled to recognize as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact." And Art. II of the Argentine Anti-War Pact declares that as between the parties thereto "territorial questions must not be settled by violence, and that they will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms."

ness of a people depends on the degree of promptitude with which the gulf is narrowed.[1]

Maine's contribution lay in his explanation of the process by which such societies had closed the gap. His historical studies taught him that legal fiction, equity, and legislation had been successively utilized for this purpose as Roman society developed, and he ventured to generalize this sequence because he knew "no instance in which the order of their appearance had been changed or inverted." [2]

I am aware that the same distinguished jurist warned that "analogy, the most valuable instrument in the maturity of jurisprudence, is the most dangerous of snares in its infancy." [3] Many international lawyers have cogently argued that international law is a system of law in its infancy [4] and consequently that one should be cautious in illuminating international law by analogies from matured private law systems.[5]

Sir Henry Maine, however, while basing his generalization upon historical studies of certain private law systems, did not confine it to these systems. He extended it to all "progressive societies." It can scarcely be denied that the world community, which has been developing since the discoveries of the fifteenth century, the utilization of the art of printing and the achievements of inductive science brought all the major branches of mankind into continuous contact with each other, is a progressive society.[6] We might, therefore, inquire whether Sir Henry Maine's generalization holds for this society of nations. Such an inquiry, however, would carry us too far afield and I will merely call attention to Professor Dickinson's discussion of the use by seventeenth and eighteenth century jurists of the fiction that States are natural persons in a state of nature; [7] to Professor Lauterpacht's exposition, supported by Judge Moore's *History and Digest of International Arbitrations*, of the way in which arbitral tribunals during the nineteenth and early twentieth centuries utilized legal maxims and principles of advanced systems of private

[1] Maine, Ancient Law, 4th ed., London, 1870, p. 24. A. J. Toynbee expresses the same thought in "Peaceful Change or War," International Affairs, January, 1936, Vol. 15, p. 27. E. D. Dickinson suggests that in the society of nations, law has been in advance of opinion because of the influence of certain theories from advanced systems of municipal law in its early development, particularly the theory of natural equality. (The Equality of States in International Law, 1920, p. 5.) But see Goebel, The Equality of States, 1923, p. 79 ff.

[2] Maine, *op. cit.*, p. 25. [3] *Ibid.*, p. 19.

[4] Sir John Fischer Williams, "Sovereignty, Seisin and the League," British Year Book of International Law, 1926, p. 35. See also W. Jethro Brown, The Austinian Theory of Law, London, 1906, p. 52.

[5] Lauterpacht states the limitations upon the use of such analogies, Private Law Sources and Analogies of International Law, 1927, pp. 84–86. See also Dickinson, Yale Law Journal, Vol. 26, p. 574 ff.; Q. Wright, Mandates under the League of Nations, 1930, p. 347 ff.

[6] J. B. Scott, The Spanish Origin of International Law, 1934, Part 1, Chap. 1; Oppenheim, International Law, Vol. 1, sec. 42.

[7] Dickinson, The Equality of States, p. 29 ff.

law in the administration of international equity; [8] and to Professor Hudson's monumental texts of *International Legislation* in the post-war period, with discussion of the initiation of this method of legal change in the nineteenth century.[9]

My interest in Maine's generalization is not to demonstrate its truth, but to indicate that all the methods for peacefully changing law which he discusses have been utilized by the community of nations during the past four centuries. We must set recent demands, and proposals for more efficient methods of peaceful change against this background of legal development.

We may also inquire whether present demands for change flow from inadequacies in the procedure for developing international law or from discontent with law altogether in international relations. An anarchic society, composed of dynamic members, would probably change more rapidly than a society of such members regulated by law. It may be that there are statesmen or even States who prefer anarchy and the opportunity to fish in troubled waters to law in international affairs.

The contemporary society of nations has, during less than five centuries in which it has been developing, multiplied in area and in population and transformed its social, political, economic, and military techniques, but none of these changes has been more remarkable than that of its law. One might almost describe the change of the society of nations from the age of Machiavelli to the age of Mussolini as a change from an anarchic to a law-regulated society, even though *Il Duce* resents the change. Evidence to support this proposition might be drawn from a consideration of the changes in the customary or unwritten law of nations,[10] but evidence from changes in the characteristics of treaties which embody the written law of nations is more tangible and is readily avilable in Dr. Tobin's excellent study.[11]

Treaties have increased not only in the number of instruments perfected

[8] *Supra*, note 5. See also Max Habicht, The Power of the International Judge to Give a Decision *ex aequo et bono*, New Commonwealth Institute, London, 1935.

[9] Manley O. Hudson, International Legislation, 1931, Vol. 1, p. xviii.

[10] The changes are suggested by the designation of the successive periods in the leading recent history of international law,—the ages of the prince, the judge, and the concert. (G. Butler and S. Maccoby, The Development of International Law, London, 1924.) See also historical résumés by Oppenheim (International Law, Vol. 1, secs. 43–51) and A. S. Hershey (Essentials of International Public Law and Organization, N. Y., 1927, Chaps. 4–5), and statement of the trend by Georg Schwarzenberger (William Ladd, An Examination of an American Proposal for an International Equity Tribunal, New Commonwealth Institute, London, 1935, p. 77), and P. B. Potter (Manual Digest of Common International Law, N. Y., 1932, p. 124).

[11] H. J. Tobin, The Termination of Multipartite Treaties, 1933. See also Q. Wright, "The Constitutionality of Treaties," Am. Journ. Int. Law, Vol. 13 (1919), p. 242; P. B. Potter, Manual Digest, p. 116 ff.; D. P. Myers, Manual of Collections of Treaties, Cambridge, 1922.

in a year, but in the number of parties to each instrument.[12] Until the nineteenth century a treaty seldom had more than two parties. Even the settlements of Westphalia and Utrecht consisted of a number of independent treaties between two or a small number of States. At Vienna in 1815 for the first time the fruits of a conference were incorporated in a General Act to which most of the interested States were parties. Multipartite instruments, each of which establishes over a thousand bipartite relations, have now become common.

Coupled with these formal changes have been more important changes in substance and standards of interpretation. An increasing proportion of treaties have formulated rules of common and presumably permanent interest of the parties, very different from the short-lived, contractual bargains of earlier centuries. In the latter the considerations moving each party were usually of a different kind and were expressed in different articles of the treaty, thus rendering the entire instrument terminable with lapse or breach of a single article.

The new type of treaty tends to establish administrative machinery for its own application and interpretation, or to rely on permanent institutions such as the Permanent Court of International Justice for juristic supervision. With this change the interpretation of treaties has tended to be governed by the doctrine *pacta sunt servanda* by which the design of the treaty is preserved, and the doctrine *rebus sic stantibus* becomes, not an excuse for avoidance, but an application of the design of parties with respect to conditions of termination. In earlier centuries diplomatic interpretation frequently subordinated the application, interpretation, or even the validity of treaties to the exigencies of war or policy.

The subject matter of treaties has expanded remarkably, bringing the most sacred attributes of sovereignty out of the realm of domestic jurisdiction into that of international law. The States' discretion in the making of tariffs, the exploitation of labor, the building of armaments, or even the use of war, has been limited by recent instruments.

In a society where there is no law, there is no law-breaking. The rapid development of an anarchic family of nations into a law-regulated society has meant more law-breaking, and it is not surprising that those who find that law interferes with their pursuit of immediate interests should seek to weaken the legal structure or to provide themselves with special dispensations.

I need not go into the propaganda which has issued from governments in various parts of the world with one or both of these objects in view, but it is

[12] Tobin (*op. cit.*, p. 15) makes the following comparison of treaties concluded in the five years following the treaties of Utrecht, Vienna and Versailles.

Dates	*Bipartite treaties*	*Multipartite treaties*
1713–1718	28	4
1815–1820	179	17
1920–1925	600	125

necessary to keep firmly in mind that proposals intended to undermine the prestige of institutions applying international law and suppressing illegal violence; proposals designed to permit certain Powers calling themselves great to ignore the law; or proposals intended to reward such Powers if they will desist from illegal behavior in a particular instance, if accepted, will reduce the rôle of law in the world community.

II

In dealing with the subject of peaceful change, we must distinguish changes of law from changes of rights. We must also distinguish normal from abnormal, and collective from individual procedures of change.

Every legal system in a progressive society needs procedures for changing the law in order to keep it abreast of the sociological facts of the community, and procedures by which the members of the community can acquire and transfer rights within the law. Probably every legal system also needs procedures for suspending or modifying the law in emergencies and for changing or transferring the rights of particular persons under public necessity. But such extraordinary procedures must be resorted to with restraint and under the authority of the community as a whole, or the society will cease to be one of law.

Perhaps the community of nations would be better off with less law. The American Society of International Law, however, would belie its name if it supported such a position. I doubt whether the complex problems of contemporary international relations can be satisfactorily solved by what Dean Pound has called "the administration of justice without law." [13] I will assume that what is wanted is not less international law, but a more adequate international law.

Continuing the lead suggested by Sir Henry Maine's discussion of the progress of juristic change, let us consider the mode by which change takes place in systems of municipal law and international law today. Systems of municipal law recognize as methods for permanently or temporarily changing law, (1) legislation, including therein constitutional amendment, legislative action, and administrative ordinance; (2) juristic analysis, including therein judicial precedent, administrative ruling and juristic writing, and (3) proclamation of emergency, including therein declaration of war, suspension of constitutional guaranties and proclamation of martial law. (4) Revolution, military occupation and conquest are methods by which law has sometimes been changed in large areas, but from the standpoint of the system of municipal law encroached upon, such changes are illegal, although they may acquire legality by subsequent recognition. The first two of these methods are normal, the first and third are collective. Parallel to these methods of changing law we may distinguish four methods of changing rights: (1) Adjudication, including therein judgment of judicial and administrative courts in the appli-

[13] Columbia Law Review, January, 1914, Vol. 14, p. 1 ff.

cation of equity; (2) contract, including therein all acquisition or transfer of rights by exercise of the normal powers of persons under law; and (3) exercise of extraordinary public authority, including therein exercise of the powers of eminent domain and police, and such legislative intervention as bills of attainder and *ex post facto* laws. (4) In fact, rights are sometimes acquired or transferred as a result of crime, tort, or illegal behavior on the part of individuals, but the law always seeks to prevent such changes. The first two of these methods are normal, the first and third are collective.

Contemporary international law presents an almost complete parallel to these methods of change in municipal law. (1) General or multipartite treaties have been called international legislation, and constitute an increasingly important method of changing international law. Article 23 of the League of Nations Covenant proposes changes by this method in the law governing many social and economic fields. While the process of international legislation is a slow one at the best, the procedure of international conferences has been steadily improving and some inroads have even been made upon the *liberum veto*.[14] It is unfortunate that international law lacks a wider vocabulary to distinguish treaties with respect to their intended permanence and ease of revision. If we could distinguish basic from secondary documents of international law as readily as we distinguish constitutions, statutes, and ordinances in municipal law, the problem of revision might be simplified.[15]

(2) Judicial precedent and juristic writing are recognized as subsidiary sources of law for the Permanent Court in Article 38 of its Statute. The influence of juristic writing in changing the law is difficult to estimate, though courts tend to minimize it.[16] Text writers lose influence if they depart far from the law as it is, but the cautious speculation, never wholly absent from their writings, perhaps provides the best index to sober world opinion and, given time, may produce important and desirable changes in the law.

The doctrine *stare decisis* is formally less applicable in the World Court

[14] Tobin, *op. cit.*, p. 206 ff.

[15] The Treaties of Vienna (1815) characterized certain stipulations as of "superior and permanent interest," and various provisions of the Treaty of Versailles were subject to different procedures of revision or termination. (*Ibid.*, pp. 211, 227.) Equally important is a vocabulary to distinguish law-making treaties from treaties having the characteristics of executory contracts, of conveyances, or of articles of incorporation. (See A. D. McNair, "The Function and Differing Legal Character of Treaties," British Year Book of International Law, 1930, p. 100 ff.)

[16] *The Paquete Habana*, 175 U. S. 677 (1900): "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. . . . In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims." West Rand Central Gold Mining Co. Ltd. *v.* The King, L.R. (1905) 2 K.B. 391: "In many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, 'law'."

than in many national courts, but the tendency of a permanent tribunal to follow its own past opinions is inevitable even when these opinions mark departures from past practice. Recent analysis of the court's decisions suggests that it has been gradually changing the law in the direction of limiting the capacity of sovereignty to frustrate accepted obligations.[17]

The capacity of the court rapidly to adapt the law to changing conditions is, however, limited, even with the use of such doctrines as "abuse of powers" and "*rebus sic stantibus*." [18] It is to be hoped that the court may be able to find States liable for disproportionate injury caused to other States by arbitrary or discriminatory exercise of their domestic competence to make tariffs or monopolize raw materials. It is also to be hoped that the court may find that executory clauses in treaties between League members conflicting in terms or spirit with the mutual respect required by such provisions as Article 10 of the Covenant or the Pact of Paris, are void or voidable on the ground of duress or changed conditions or, in the case of League members, on the basis of Article 20 of the Covenant. Obviously, however, a court must deal cautiously with such problems, particularly when the court is exercising compulsory jurisdiction and depends mainly on the good faith of the litigants for execution of its judgments.[19] The same considerations would urge caution even in a special equity tribunal, less restricted in the sources of its law, but with compulsory jurisdiction, unless indeed, it were supported by an efficient international police force, as suggested by the New Commonwealth Society of England.[20] Where jurisdiction has been conferred by the litigants for the particular case, as in *ad hoc* arbitral tribunals, or where the litigants have agreed to accept a decision *ex aequo et bono* under Article 38, Par. 2 of the World Court Statute, the tribunal can exercise wider discretion in modifying the law by broad considerations of equity in the particular case but its award will have less influence in changing the law for the future.[21]

[17] H. Lauterpacht, The Development of International Law by the Permanent Court of International Justice, London, 1934, p. 89 ff.

[18] See H. Lauterpacht, The Function of Law in the International Community, Oxford, 1933; Norman Wait Harris Memorial Foundation, An American Foreign Policy Toward International Stability, University of Chicago, Public Policy Pamphlet No. 14, 1934, p. 44 ff.

[19] Q. Wright, "The Outlawry of War," Am. Journ. Int. Law, Vol. 19 (1925), p. 100.

[20] The aim of this society is "Promotion of international law and order through the creation of an Equity Tribunal and an International Police Force." (See New Commonwealth Institute, Annual Report, 1935, p. 14, and The New Commonwealth, Vol. 1, No. 1, Oct. 1932, p. 4.) See also David Davies, The Problem of the Twentieth Century, London, 1930; Hans Wehberg, Theory and Practice of International Police, London, 1935; J. J. Vander Leeuw, The Necessity of an International Police, London, 1935, and other memoranda submitted by the New Commonwealth Institute to the International Studies Conference on Collective Security, London, 1935. The feasibility or the expediency of attempting to coerce observance of awards not based on accepted law has often been questioned, and it appears that no treaties have authorized international tribunals to go beyond the law except when authorized by express agreement of the parties for the particular case. (Habicht, *op. cit.*, p. 76.)

[21] Max Habicht, The Power of the International Judge to Give a Decision *ex aequo et bono*, New Commonwealth Institute, 1935.

(3) International law recognizes that a state of war modifies the customary and conventional rules applicable in the relations of belligerents both with each other and with neutrals. The content of these extraordinary rules has always been subject to much controversy, and the development of recent conventional rules prohibiting resort to war makes the subject even more confused.[22] The necessity of recognizing the applicability of special rules during a war, however illegal may have been its origin, does not require that illegal violence be recognized as a source of rights. The non-recognition doctrine, which withholds the sanction of international law from treaties or territorial seizures resulting from such violence, should assist in preventing acquisition of the kind of "rights" which are most apt to raise dangerous demands for revision.[23]

(4) As there have been revolutions in States, so there have been collapses of societies of nations leading to radical changes in the applicable international law. Such a collapse in Western civilization took place when classical civilization gave way to medieval in the fifth century and when medieval gave way to modern in the fifteenth century. Such revolutionary change can hardly be contemplated or provided for by specific procedures in the system of international law. They mark the failure of the system as a whole to reconcile stability with change.

Passing from changes of law to changes of rights, we find that under international law, as under municipal law, rights have been changed by adjudication, contract, community intervention and illegally accomplished facts.

1. Adjudication is an increasingly important method of interpreting rights, but it seems probable that it is of decreasing importance as a means of changing rights. The Permanent Court of International Justice is more bound by law than were the *ad hoc* tribunals of jurists under the Permanent Court of International Arbitration, and these, in turn, were more bound by law than were the sovereigns who earlier were frequently appointed as arbitrators.[24] But, as adjudication has become less flexible, procedures of ar-

[22] Philip C. Jessup, Neutrality, Its History, Economics and Law, N. Y., 1936, Vol. 4: Today and Tomorrow; Q. Wright, "The Meaning of the Pact of Paris," Am. Journ. Int. Law, Vol. 27 (1933), p. 39 ff.

[23] Q. Wright, Am. Journ. Int. Law, Vol. 26 (1932), p. 342 ff.

[24] *Supra*, notes 18, 19. A right is an interest defined and protected by law, consequently if the court determines an interest to be a right of a claimant other than the *de facto* possessor of the interest, it does not transfer the right to that claimant but merely holds that other claimants, even though in possession, had no right. Where, however, the tribunal can go beyond strict law to broader sources of justice, rights valid in strict law may be transferred to another with a stronger claim in equity. Thus transfer of rights through adjudication must always rest upon a distinction between ordinary and extraordinary sources of objective justice often spoken of as the distinction between law and equity, and manifested in many international conventions, particularly in par. 2 of Art. 38 of the Statute of the Permanent Court of International Justice: "This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto." Habicht (*op. cit.*, pp. 3, 6) has collected some fifty international instruments indicating this distinction.

bitration and conciliation under special treaties or under Article 15 of the League Covenant have been utilized as a means for settling important disputes, in which higher considerations of equity and policy may have an influence. Even more flexible is the procedure of the League under Article 11 for taking action to prevent war. It is to be noted that the commissions in the Mosul dispute in 1925 and in the Manchurian dispute in 1932, each established under Article 11, recommended important changes of rights and that in both cases the recommendation was adopted by the League of Nations. In the Mosul case it was also adopted by the parties and brought about an apparently permanent settlement. But in the Manchurian case, it was rejected by Japan, and the problem is still unsettled.[25] Such procedures, while sometimes necessary to preserve peace, must be used sparingly or the rôle of law in the society of nations will be reduced.

2. The commonest mode of changing rights under international law is by the making or termination of bilateral treaties. While transfers of territory by treaties are no more common now than in past centuries, States have exercised their treaty power far more frequently and in a wider variety of fields to qualify the exercise of their jurisdiction. At the same time treaties tend to be reciprocal in every clause, and to be provided with clauses for denunciation on notice by either party. Thus there is less hesitation to submit their interpretation and application to juristic supervision, and more willingness to recognize the separability of treaty clauses.[26] This ease of denunciation has tended to make unnecessary appeal to the influence of war, breach by one party, or other changed conditions as a ground for unilateral abrogation. As a result, States have tended to assume that international law does not permit termination on such grounds unless they are accepted by agreement of the parties or the decision of a competent tribunal.[27]

At the same time, treaties made through violence or threat, and unequal treaties, still exist, and the general legalization of treaty application, acceptable in the case of most treaties, has rendered the problem of revising such treaties more difficult. The doctrine *rebus sic stantibus* has proved difficult to reconcile with the doctrine *pacta sunt servanda* in the case of such treaties, because the opinion of the two parties generally differs as to the conditions

[25] Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations London, 1934, p. 182 ff. [26] Tobin, *op. cit.*, p. 250 ff.

[27] See Declarations of the Great Powers in London, 1871, Stresa, 1935, and London, 1936, affirming the sanctity of treaties and respectively denouncing breaches by Russia of the Black Sea clauses of the Treaty of Paris (1856) and by Germany of the disarmament clauses of the Versailles Treaty (1920) and the Rhineland demilitarization clauses of the Versailles and Locarno (1927) Treaties. See also French definition of *rebus sic stantibus* in Free Zones case (P.C.I.J., Ser. C, No. 58, pp. 109–110), and Research in International Law, Draft Convention on Treaties, Arts. 27–29, 31–32 (Am. Journ. Int. Law, Supp., Vol. 29 (1935), p. 662 ff.). Myers remarks, "Historically treaties were originally of little consequence if they were inconvenient," and cites numerous instances of treaty violations, particularly in the seventeenth and eighteenth centuries. (D. P. Myers, "Violation of Treaties," Am. Journ. Int. Law, Vol. 11 (1917), pp. 538 ff., 545; 794 ff.; Vol. 12 (1918), p. 96 ff.)

that were envisaged at the time of negotiation as decisive factors moving them to undertake the obligations stipulated.[28] Treaties that are voluntary and reciprocal in each article have within them the sanction of mutual self-interest and usually include provisions for denunciation or revision. Coerced unequal treaties which lack these characteristics ought not to be made, and under the principles of the Covenant, the Pact of Paris, and the Stimson doctrine, they would not be valid in the future.[29]

3. The process of emergency consultation among the great Powers leading to intervention or recognition of *de facto* changes has been an important method of changing rights under international law, somewhat cognate to such extraordinary processes in municipal law as exercise of the police power and the power of eminent domain. Conquest of territory, repudiation of treaties, and declaration of independence have created rights under international law when generally recognized by the members of the community of nations. In fact, recognition by the "Great Powers" or by the "Concert of Europe" has sometimes had this effect, although usually the change of rights has been eventually sanctified by the formality of a treaty to which the yielding State is a party.[30] It is as a substitute for this process of recognition, which stimulates the *fait accompli* method of politics, weakens confidence in and respect for law, and nullifies the prohibitions against violence in the Pact and the Covenant, that the procedure of Article 19 of the Covenant has been designed. It resembles other procedures of collective recognition and intervention, as by admission to the League of Nations, termination of mandates, approval of sanctions, which have been superseding the older processes of individual recognition and intervention as modes of changing rights.[31]

4. Violent seizure of territory, repudiation of treaties or other acts in violation of international law, even though not recognized by formal declara-

[28] See Research in International Law, Draft Convention on Treaties, Art. 28 *supra*, and Chesney Hill ("The Doctrine *Rebus Sic Stantibus* in International Law," Univ. of Mo. Studies, July, 1934, pp. 75, 83), for evidence supporting this interpretation of *rebus sic stantibus*. Sir John Fischer Williams (Am. Journ. Int. Law, Vol. 22 (1928), p. 89 ff.), and A. D. McNair (Br. Year Book of Int. Law, 1930, p. 109), regard the doctrine as essentially juridical rather than diplomatic and analogous to the doctrine of frustration of contract in municipal law (at least with respect to treaties of an essentially contractual nature). The doctrine of frustration is, however, based upon the presumed intention of the parties at the time the contract was made and thus is within the conception of the Research in International Law draft, and differs from the political conception of *rebus sic stantibus* which would permit a State to denounce a treaty whenever it thinks it runs counter to its important interests.

[29] *Supra*, note 23.

[30] Tobin discusses the legislative control of the "public law of Europe" by the Great Powers (*op. cit.*, p. 218 ff.). For details see Holland, The European Concert in the Eastern Question, Oxford, 1885.

[31] Malbone W. Graham, In Quest of a Law of Recognition, University of California, 1933. Establishment of a collective procedure for effecting such changes of rights would inevitably tend to develop a law limiting the exercise of this procedure. The evolution of a law for exercising the powers of the League with respect to termination of mandates is discussed by W. H. Ritsher, Criteria of Capacity for Independence, Jerusalem, 1934.

tion or treaty, may acquire legality through prescription or tacit recognition. The Stimson doctrine, generally recognized as an implication of the Pact of Paris and Article 10 of the Covenant, would prevent such transfers of legal titles as the result of aggression.[32]

This doctrine, however, in preventing change by individual recognition, makes more necessary the development of peaceful methods for adapting rights likely to lead to emergency situations. The Stimson doctrine cannot be effective without sanctions to discourage and stop aggression and collective action to modify conditions likely to cause aggression. Article 19 is intended to provide the latter.

III

Article 19 of the Covenant provides:

> The Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

That this article was intended primarily to deal with territorial adjustments and was designed as a complement to the territorial guaranty of Article 10, is indicated by its history. Article 3 of President Wilson's first draft Covenant combined the provisions which subsequently became Articles 10 and 19, in the following words:[33]

> The contracting powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three-fourths of the delegates (at the Assembly) be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The contracting powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdictional boundary.

To similar effect, though more specific, is Lord Robert Cecil's draft of January 20, 1919:[34]

> If at any time it should appear that the boundaries of any State guaranteed . . . do not conform to the requirements of the situation,

[32] *Supra*, note 23, and Wright, "The Legal Foundation of the Stimson Doctrine," Pacific Affairs, Dec. 1935, Vol. 8, p. 439 ff.

[33] Hunter Miller, The Drafting of the Covenant, Vol. 2, p. 12.

[34] *Ibid.*, Vol. 2, p. 107. The original Cecil plan had neither territorial guarantees nor provision for territorial revision (*ibid.*, Vol. 2, p. 61). The reason for these omissions was set forth in a foreign office memorandum prepared soon after the armistice but first published during the International Studies Conference of London, 1935. (Zimmern, A Historical Note on Collective Security, 8th Int. Studies Conf. Docs., 1935.)

the League shall take the matter under consideration and may recommend to the parties affected any modification which it may think necessary. If such recommendation is rejected by the parties affected, the States members of the League, shall, so far as the territory in question is concerned, cease to be under the obligation to protect the territory in question from forcible aggression by other States, imposed upon them by the above provision.

It is difficult to interpret Article 19 juristically because it has had so little application in practice. Peru appealed to the Assembly in 1920 for revision of its treaty of 1883 with Chile, but withdrew the request before any action had been taken. Bolivia applied to the Assembly at the same time for revision of the treaty of 1904 by which she had ceded to Chile the territory which had formerly given her access to the Pacific. Chile opposed the application because of the "absolute and radical incompetence of the League of itself to revise treaties, and especially treaties of peace." [35] Eventually a committee of jurists reported: [36]

> That, in its present form, the request of Bolivia is not in order, because the Assembly of the League of Nations cannot of itself modify any treaty, the modification of treaties lying solely within the competence of the contracting States.
>
> That the Covenant, while insisting on scrupulous respect for all treaty obligations in the dealing of organized peoples with one another, by Article 19 confers on the Assembly the power to advise the consideration by members of the League of certain treaties or the consideration of certain international conditions.
>
> That such advice can only be given in cases where treaties have become inapplicable, that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in case of the existence of international conditions whose continuance might endanger the peace of the world.
>
> That the Assembly would have to ascertain, if a case arose, whether one of these conditions did in point of fact exist.

Chile was fortified in this case by an opinion prepared by John W. Davis of the United States.[37] He thought it clear that Article 19 "must be read in the light of established principles of international law." That law supported the sanctity of treaties, as indeed did the preamble to the Covenant:

> An interpretation of the Covenant which would open the door for the revision at the request of either party of all treaties by which the

[35] Quoted by W. E. Rappard, International Relations as Viewed from Geneva, 1925, p. 111.

[36] League of Nations Assembly, 1921, Records, Plenary Meetings, p. 466. Chesney Hill suggests that the third paragraph reduces the application of Art. 19 to cases of *force majeure*. (*Op. cit.*, p. 83.)

[37] Luis Barios Borgano, The Problem of the Pacific, together with two Juridical Reports by John W. Davis, LL.D., Baltimore, 1924, p. 180 ff.

> rights of nations are established and upon which the peace and order of the world depends, would make the League of Nations an enemy of treaties rather than their guarantor, a disturber rather than a promoter of peace.

He, however, found that "treaties which fall within the accepted limits of the principle (*rebus sic stantibus*) may properly be said to have become inapplicable." And further that obligations or understandings alleged to be inconsistent with the Covenant were under Article 20 to be terminated. He, therefore, suggested that on these two grounds alone could the reconsideration of treaties be requested under Article 19.

The second clause of Article 19 authorizing the Assembly to consider "international conditions whose continuance might endanger the peace of the world" he thought "so general as to be incapable of definition," but, clearly, "however broad may be the interpretation of the clause, it would be a contradiction in terms to include within it treaties of peace solemnly negotiated and formally ratified by the contracting parties."

He found that there was no change of circumstances which would bring the treaty of 1904 under the principle *rebus sic stantibus*, nor was it inconsistent with the Covenant. Consequently "the Assembly is without competence to consider the matter."

This opinion, and to a lesser extent that of the League jurists, seemed to limit the competence of the Assembly under Article 19 to cases where there was a *prima facie* juridical ground for terminating a treaty. Such a restrictive interpretation is not consistent with the intent of the article as suggested by the Wilson and Cecil drafts which led up to it. Nor is it consistent with the use of the article during the Peace Conference as a means to induce hesitant delegations to accept inequitable articles of the peace treaty on the theory that they could later be changed under Article 19.[38] The Tenth Assembly in 1929 accepted a much broader view of its competence in its resolution dealing with China's declaration of intention to ask it to advise reconsideration of her unequal treaties. This resolution:[39]

> Declares that a member of the League may on its own responsibility, subject to the rules of procedure of the Assembly, place on the agenda of the Assembly, the question whether the Assembly should give advice as contemplated by Article 19 regarding the reconsideration of any treaty or treaties which such member considers to have become inappli-

[38] Harold Nicholson, Peace Making, 1919, pp. 91–92. In a conversation with the American experts on their way to the Peace Conference on Dec. 10, 1918, President Wilson said, according to notes taken by Dr. Isaiah Bowman: "The League of Nations implied political independence and territorial integrity plus later alteration of terms and alteration of boundaries if it could be shown that injustice had been done or that conditions had changed. And such alteration would be the easier to make in time as passion subsided and matters could be viewed in the light of justice rather than in the light of a peace conference at the close of a protracted war." Miller, *op. cit.*, Vol. 1, p. 42.

[39] L. of N., Monthly Summary, Oct. 1929, Vol. 9, p. 311.

cable, or the consideration of international conditions the continuance of which might in its opinion endanger the peace of the world.

Declares that for an application of this kind to be entertained by the Assembly, it must be drawn up in appropriate terms, that is to say, in terms which are in conformity with Article 19.

Declares that, in the event of an application in such terms being placed upon the agenda of the Assembly, the Assembly shall in accordance with its ordinary procedure discuss this application, and, if it thinks proper, give the advice requested.

This resolution suggests that any application by a member must be considered by the Assembly if formally within Article 19, which would seem to imply only that it contains the allegation that the treaty has become "inapplicable," or that international conditions exist "continuance of which might endanger the peace of the world." The Assembly's appreciation of the soundness of these allegations would be indicated by the nature of its advice, but no preliminary objections to its competence would be in order.

Thus, judging from the history of the article and the Assembly's own interpretation of it, the Assembly might be guided by political even more than by juridical considerations in giving its advice. The term "inapplicable" might be construed, not as referring to conditions rendering the treaty juridically void or voidable, but to probable consequences rendering its continuance inexpedient in the general interest. Since the doctrine *rebus sic stantibus* is a juridical doctrine, it does not limit the action of the Assembly and its interpretation is unimportant in the functioning of Article 19.[40]

It seems doubtful whether requests for territorial change can be based upon the allegation that the treaty by which the territory was acquired is inapplicable. Such a demand is not for revision of the instrument by which a transfer was effected and its limits defined, but for cession of territory. By stating demands for territorial cession as demands for the revision of treaties, the nature of the demand is somewhat obscured.[41]

It would seem, however, that such demands can properly be made under the second clause of Article 19, upon the allegation that the present boundaries

[40] See P. B. Potter, The Revision of Treaties, Geneva Special Studies, 1932, Vol. 3, pp. 9–10. It was suggested by Belgium in discussions concerning China's claim to terminate the treaty of 1865 that Art. 19 confirmed the principle *rebus sic stantibus* by establishing a procedure "which favors the revision of treaties which have become inapplicable." France took the same position in connection with the Free Zones case before the World Court, and suggested, as had Belgium, that this article precluded unilateral abrogation of treaties on allegation of changed conditions, at least until its procedure had been exhausted. (P.C.I.J., Ser. E, No. 4, p. 151; Ser. C, No. 17–I, p. 89.) This position was also taken by M. Negulesco in a dissenting opinion (*ibid.*, Ser. A, No. 22, p. 30; see also Chesney Hill, *op. cit.*, pp. 82–83). To suggest, however, that Art. 19 looks in the same direction as *rebus sic stantibus* and must be utilized before unilateral abrogation of a treaty is permissible, does not mean that the Assembly must be guided by that doctrine in giving its advice under the article.

[41] "A revision of treaties would not, or at any rate might not, in and by itself, be taken to extend to an alteration of arrangements already executed in pursuance of a treaty." (Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations, p. 177.)

or distribution of territory is "an international condition, the continuance of which might endanger the peace of the world."[42] It is to be observed that the Wilson and Cecil drafts referred only to territorial readjustment or modification, and made no mention of treaties.[43]

Proceedings under Article 19 should not be interpreted as primarily a process for settling political disputes (Article 15), or for preventing impending war (Article 11), or for changing international law (Articles 20, 23), although its close relationship to proceedings under these articles has been pointed out.[44] Rather it provides a political procedure for modifying legal rights in the interests of the world community. The utilization of this procedure may incidentally settle disputes, legislate, and prevent war. It has, perhaps, some analogy to the exercise of the right of eminent domain, an analogy, suggested by the Wilson draft, which refers to possible "material compensation" to the State deprived of rights, and rests on the principle "that the peace of the world is superior in importance to any question of political jurisdiction or boundary." This interpretation seems to be consistent with the statement in the recent volume on *The Aims, Methods, and Activity of the League of Nations*, prepared under the auspices of the Secre-

[42] Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations, p. 177.

[43] The suggestion for a clause covering treaty revision was made by Cecil after Miller had pointed out that Cecil's proposal withdrawing the guarantee of Art. 10 from territory, transfer of which had been advised, "would simply tend to legalize agitation in Eastern Europe for a future war." (Miller, *op. cit.*, Vol. 1, pp. 52–53.) Miller was responsible for the further modification of the Wilson and Cecil proposals limiting the Assembly's power to the giving of advice. (*Ibid.*, Vol. 1, p. 202.)

[44] Williams suggests that Art. 19 will probably function mainly by supporting the principle of change, in proceedings under Art. 11 or 15 (*op. cit.*, p. 182). Art. 15, par. 8, however, would usually preclude recommendations for transfer of rights under that article. Art. 11, however, authorizes the League to "take any action that may be deemed wise and effectual to safeguard the peace of nations," and thus is subject to no limitation with respect to domestic questions. Par. 2 of Art. 11, which was repeated in the Council's resolution of Dec. 10, 1931, as its instruction to the Lytton Commission, closely resembles the second clause of Art. 19, but, instead of "international *conditions* whose continuance might endanger the peace of the world," it refers to "any *circumstance* whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." The use of the word "circumstance" rather than "conditions" suggests some new event, such as military activities, new tariff or immigration laws or a recent transfer of rights, rather than an established state of affairs deemed unjust. Thus it might be questioned whether demands for revision of established boundaries or old treaties could be brought up under Art. 11 except in connection with the liquidation of some new "circumstance." The British commentary which accompanied the final text of the Covenant said in regard to Art. 19 only that it should be read together with Art. 11.

The relation of Art. 19 to Art. 20 was noted in the J. W. Davis memorandum referred to (*supra*, note 37), and Sir Frederick Pollock, in an early commentary on the Covenant, thought Art. 19 looked toward but did not adequately provide for revision of international law, a matter more concretely dealt with in Art. 23. (Pollock, The League of Nations, London, 1920, pp. 162, 216.)

tariat, that "its object is to make it possible for legal situations to evolve on lines parallel to the evolution of justice, and international need." [45]

IV

From a practical standpoint, the value of Article 19 depends upon (1) the effect of an application under it upon world politics, (2) the vote necessary for the Assembly to give advice, (3) the considerations which would influence the States in their votes, (4) the effect of a resolution, if passed, upon the treaty or condition complained of, and (5) the effect of the use of the article upon the authority of international law.

1. A State which places a request for territorial change upon the agenda of the Assembly announces a national policy, and so long as the world anticipates the use of force as an instrument of national policy, the State that is asked to cede territory may well assume that the applicant State intends to take the territory by force, if it cannot get it otherwise. Thus the mere application might result in dangerous military preparations by the State in possession. It, therefore, seems probable that applications under Article 19 must await further stabilization of peace than exists today. When collective security has developed so that States no longer fear invasion, an atmosphere will exist in which Article 19 may safely be invoked.[46] It may also be noticed that until that time, powerful States may feel that conquest of territory is a quicker and surer process than invocation of Article 19.[47] It appears, therefore, that the development of effective sanctions against aggression has an important relation to the efficiency of Article 19 as a means of peaceful change.

2. It is doubtful whether procedure under Article 19 can be regarded as dealing with a dispute between States; thus absolute unanimity would be required as provided in Article 5. The vote of the interested States could not be ignored as specified for recommendations under Article 15. The rule of qualified unanimity may be applicable in proceedings under Article 11,[48] and

[45] P. 44.

[46] Memoranda from nationals of certain "revisionist" States submitted to the International Studies Conference on Collective Security (London, 1935) considered effective provisions for revision the prerequisite to collective security, while memoranda from nationals of certain "status quo" States considered proposals for revision of boundaries the greatest obstacle to collective security. Compare particularly documents submitted to Preliminary Study Conference on Collective Security (Paris, May, 1934) by Verdross (Austria, p. 35 ff.) and Coppola (Italy, p. 93 ff.) with that submitted by the Rumanian Social Institute (p. 116 ff.).

[47] Potter suggests that China, Germany, Austria, Hungary and Bulgaria have not applied for revision under Art. 19 because they have been certain they could not command a favorable vote in the Assembly. (*Op. cit., supra*, note 40, p. 11.)

[48] The League commission of jurists, which met in June, 1935, to consider possible action under Art. 11 to deter treaty violation, were unable to agree whether Art. 11 required unanimity or not. (L. of N., Monthly Summary, June, 1935, Vol. 15, p. 147. See also "The Aims, Methods and Activities of the League of Nations, published unofficially by the Secretariat, Geneva, 1935, p. 81.) Similarly inconclusive were the Council's proceedings under

may even be generally applicable to disputes under the League, in accord with the principle that no one should be judge in his own case, as suggested by the Advisory Opinion in the Mosul Case.[49] It seems to be accepted that so important a matter as advice under Article 19 cannot be regarded as merely procedural; consequently the practice of making recommendations by majority vote cannot be applied.[50] It, therefore, seems that absolute unanimity, required for "decisions" by Article 5 of the Covenant, is necessary, but obviously this would frequently make it impossible for the advice to be given, as the States "advised" to give up rights would have to approve. The Wilson draft avoided this difficulty by requiring only a three-fourths vote of the Assembly. But even if a formal resolution could not be passed, debate might manifest a general opinion which would induce negotiations between the interested States. A resolution which had, in fact, been approved by most of the States, including the major Powers, would have a persuasive influence even though it were not a formal resolution.[51]

3. Would States be governed in voting such advice by relations of alliance, friendship or hostility with the litigant States? Would they be guided by considerations of the balance of power? Would they tend to give a sop to a powerful potential aggressor in order to prevent war? Would they give consideration to the juridical validity of titles, or would they be guided by broad considerations of economic convenience, geographic configuration, or the national sentiment of the region affected? All of these considerations would, perhaps, have some weight, but it is likely that in fact the members of the League would be guided by the report of a commission sent to the spot for investigation.[52] This commission would compile geographic, economic, linguistic, historical and other materials and make a recommendation, as have the commissions sent under Article 11. The recommendation might involve holding a plebiscite in the region. By use of such a procedure and the tendency of League members to support the recommendations of the commission, gross partisanship or injustice to the weaker State would probably be avoided.

Art. 11 in connection with the early phases of the Manchurian dispute. Malcolm Davis (Councils Against War, Geneva Special Studies, Vol. 3, No. 11, p. 7) thinks these proceedings tend to support the rule of qualified unanimity, while W. W. Willoughby (The Sino-Japanese Controversy and the League of Nations, Baltimore, 1935, p. 44) thinks they support the rule of absolute unanimity.

[49] P.C.I.J., Ser. B., No. 12. There have been unofficial suggestions for amendment of the Covenant to exclude the vote of interested States under Art. 19. (See Wright and Kidd, Reform of the League of Nations, Geneva Special Studies, 1934, Vol. 5, pp. 8, 32.)

[50] Rappard, *op. cit.*, p. 113; Williams, *op. cit.*, p. 180; Potter, *op. cit.*, p. 10. Miller questions whether "advice" under Art. 19 is covered by the unanimity rule of Art. 5 with reference to "decisions." (*Op. cit.*, p. 203.)

[51] See Williams, *op. cit.*, pp. 180–181.

[52] The British League of Nations Union and the Austrian League of Nations Society have proposed the use of such an investigating commission as the recognized procedure under this article. (Wright and Kidd, *op. cit.*, p. 31.)

4. Unanimous approval by the Assembly of a resolution for transferring rights, even though the resolution were merely advice, would undoubtedly be of great political importance. The probability of the advice being acted upon immediately would, of course, depend upon the political importance of the State asked to sacrifice rights and the importance of the rights involved. The resolution would impose no legal obligation, but would constitute political pressure upon the interested parties to negotiate.

It seems doubtful whether the sanctions proposed for such advice in the Cecil resolution, namely, that failure of such negotiations would result in withdrawal of the guarantee of Article 10 from the territory in question, would be expedient. Such withdrawal would constitute an invitation to violent self-help by the beneficiary of the advice.[53]

A more suitable sanction is suggested by the analogy to eminent domain in systems of municipal law. Following the advice by the Assembly under Article 19, the League of Nations as a whole might be entitled to institute proceedings before the World Court if the parties failed voluntarily to follow the advice. The court should be competent to decree transfer of rights in accord with this advice if convinced that such transfer was necessary in the general interest and that adequate compensation was provided for the State deprived of rights. Clearly a general convention would be necessary to give the court this competence.

5. While it seems unnecessary to anticipate the extreme danger to international law which John W. Davis saw in a political application of Article 19, it is clear that use of the article should be confined to real emergencies. As Sir John Fischer Williams has pointed out, usually there would be either a dispute or threat of war and consequently the League might more appropriately act under Article 11 or 15, as in fact it has in the past.[54] But even if this is done, the existence of the principle of Article 19 makes it easier for recommendations to be made modifying existing rights, as was done in the Mosul and Manchurian resolutions. An ultimate judicial control of the type suggested would incorporate the procedure in the law itself and thus eliminate its dangerous potentialities.

While there is ample room for development, it is clear that procedures for effecting peaceful change both of law and of rights exist under the League of Nations as well as under general international law. The possibilities of these procedures should be further tested before radical innovations are attempted. The major obstacle to the use of Article 19, which provides the most definite collective procedure looking toward change of rights in the general interests, is the inadequate functioning of collective procedures designed to secure existing rights. When these procedures have become so established that ambitious States are convinced that change by violence is impossible, they may wholeheartedly apply themselves to utilizing and developing existing processes for peaceful change. While they will doubt-

[53] *Supra*, notes 34, 43.

[54] *Supra*, note 44.

less find these processes slow, they will, perhaps, be surer than resort to arms.

On the other hand, the present skepticism as to the possibility of peaceful change of rights hampers the coöperation of all States to secure rights against violence. Confidence in each of the collective processes of peaceful change and of peaceful security will develop confidence in the other, just as skepticism in regard to the practicability of each of these processes breeds skepticism in regard to the other. At the moment the skeptics have the headlines, but it is not to be assumed that the interested propaganda of the enemies of an ordered and prosperous world will fool all of the people all of the time.

Chairman BUTLER. The general discussion on this very interesting subject will be led by Mr. Harold Tobin, of Dartmouth College.

Mr. HAROLD TOBIN. Professor Wright's article draws on the minutes of the League of Nations Commission of the Paris Peace Conference to show that Article 19 was not envisaged originally as a general provision for treaty revision, but rather as a means for securing territorial changes to accompany the guaranty of frontiers contained in Article 10, and proposes to implement it to make it effective in its original sense, when collective security has tempered the existing fear of invasion. Progress toward such security seems so slow that the question arises whether a less ideal solution according more closely with existing practice of States might not be sought pending the development of that security.

It would appear that if Article 19 were entirely eliminated, there is still ample legal provision in Articles 10 to 15 of the Covenant for bringing questions of territorial change before the League. A war, a threat of war, a circumstance affecting international relations which threatens to disturb international peace or the good understanding on which peace depends, or any dispute likely to lead to a rupture or which the parties recognize to be suitable for arbitration or judicial settlement all open the way to League action in this field. Article 19's utility would appear to lie therefore in providing more effective means for handling these territorial and other problems which now either fail of solution under these articles or do not come before the League at all.

Similarly difficult of solution to territorial problems are those involved in limitations on the exercise of freedom of action on national territory, usually of new or defeated States. With rare exceptions, such as that for the Saar plebiscite and the post-war minorities treaties, no provision is made to change such limitations. Both types of problems arise most commonly from attempts to modify conditions set up by provisions in treaties of general settlement, such as those of Vienna of 1815, Paris of 1856, Berlin of 1878, and Versailles of 1919. In the past the problems have been solved, if solved at all, by peace treaties following a subsequent war, or by acceptance of a

new situation by the European Concert following unilateral violation or denunciation of the offensive provision.

There has been no little confusion in the practice of States concerning the grounds which justified release from limitations on their internal freedom of action. In 1831 Russia, in suppressing the constitution granted Poland and guaranteed in the Vienna settlement of 1815, stated that the constitution had been the voluntary act of the Emperor, and was subject to withdrawal by him. In denouncing the provisions of the 1856 treaty demilitarizing the Black Sea, she alleged repeated violation by other parties. Austria-Hungary cited "imperious necessity" as a reason for annexing Bosnia-Herzegovina in 1908. Germany stated that French violation of the Locarno Pact terminated it, and by implication the corresponding provisions of the Versailles Treaty, and justified her remilitarization of the Rhineland.

More common was the simple statement that a provision constituted a restriction of sovereignty or endangered the national security. Such were among the reasons cited by Russia in 1871 concerning the Black Sea, concerning the Free Port of Batum in 1886, and by Turkey concerning refortification of the Straits and by Germany concerning the Rhineland in 1936.

There is usually no definite stand taken by the aggrieved party that the condition objected to terminates the treaty. In some cases it has been considered as terminating the offensive provision, as in the Black Sea case as first presented by Russia, and sometimes as merely warranting the insistence of consideration of the matter by some at least of the other parties, without clear indication whether refusal means termination either of the objectionable provision or of the whole treaty. And almost without exception the other parties which have expressed a view at all have at first declined to accept the alleged grounds as warrant for the contemplated action. The important practical point, however, is that the conviction that treaty provisions, accepted under duress or not, which are deemed to endanger national security or to limit the freedom of a State in its own territory, induces the State concerned to raise insistent demands for change, even when it does not take action to relieve itself from the resultant obligations in apparent violation of the treaty concerned.

On the other hand, the settlement of territorial problems on the continent of Europe and elsewhere commonly comes about as the result of war, and the peace treaty legalizing the changes seldom gives any justification for the change in title. Two serious attempts to substitute the conference method to consider territorial questions which threatened war, those of Napoleon III in 1863 and 1866, failed through the uncertainty of the invited parties concerning the extent and implications of the problems opened up for discussion, and their ability to confine their solutions within peaceful limits. Barring special provisions covering individual regions, such as the plebiscites provided by the Versailles Treaty, it has proved very difficult to set up arrangements for peaceful transfer of territories.

Whether the changes are brought about by peaceful or by warlike means, the question—Which States are to participate in changing territorial arrangements by subsequent treaties?—is not satisfactorily answered. So far as Europe is concerned, it has been the custom since the beginning of the nineteenth century to seek the participation of all the great Powers, unless there appeared to be special reasons for seeking the approval of only a limited number. The first three annexes to the Vienna settlement, dealing with Poland and the Free City of Cracow, were signed only by Austria, Prussia and Russia, though they were part of the general settlement signed by all five of the European great Powers. Yet they were modified with the consent of only the three mentioned over the protests of the other two, the former claiming the latter had no rights in the matter. To them might be added the cases of Germany and Russia, who did not participate in the Paris negotiations in 1919, Russia not signing the resulting treaty at all. These were, however, exceptional cases.

In addition to the great Powers, it has usually been considered expedient to permit such of the smaller States as were most intimately concerned to participate in the deliberations or in the signature or both. Belgium and Holland, for example, participated to a limited extent in the negotiations which resulted in 1839 in setting up Belgium as a separate State and guaranteeing her independence. Turkey was allowed limited participation in the Berlin Conference of 1878, as were the representatives of the Danubian principalities and of Greece, though the latter were not allowed to sign the resulting treaty.

Though the Versailles Treaty was signed by 28 States, a practical limitation of the States enforcing it was set up by the Allied Great Powers, in reserving for their own control the more important political provisions, either through the agency of the Principal Allied and Associated Powers,—operating through the Conference of Ambassadors,—through the Interallied Commissions of Control, or through the Council of the League, which they proposed to control. Most of the tasks of the former two bodies under the treaty have been either accomplished or relinquished. The tasks of the Council, however, were more permanent. Its great Power membership has varied, by chance, with the interest of these Powers in maintaining existing political treaties, while the number of small Powers has been increased concurrently with the growth of these States in importance in international affairs.

The claim has been made periodically that the consent of all the parties to a treaty is necessary for its revision, in spite of the contrary practice of States for over a century. It would seem wise therefore to try to bring the law into closer accord with the facts. Meantime Article 19, which points the way to revision by a group of States other than the signatories, and designed, as Professor Wright has indicated, mainly to solve territorial problems, has remained practically unused. If it could be so modified as to meet more successfully the problem for which it was designed, and at the same

time cope with the problem of modifying limitations on national sovereignty considered as endangering national security, the field of consistent application of international law might be greatly extended.

It is submitted that the Council and not the Assembly is the organ for considering these situations in Europe or elsewhere, assuming that all the great Powers in the region concerned will be members of the Council. Whenever such problems as the denunciation of a treaty, as in the case of Russia in 1871, or a threatened *fait accompli*, such as Germany's announcement of rearmament in 1935, or a proposed change, such as that of Turkey concerning the Straits in 1936, arise, the Council should be summoned. This would stiffen the provision of Article 19 implying that the Assembly should advise reconsideration of treaties which have become inapplicable, only "from time to time." In addition to the ordinary members of the Council, those States which can prove an interest in the problem at issue would sit as they now do under Article 4, paragraph 5, of the Covenant, and as they sat with the great Powers before the birth of the League, as indicated above.

The procedure would approximate closely that permitted under Article 15, except that unanimous consent to decisions would be required. Neither in the Sino-Japanese nor in the Italo-Ethiopian dispute did the unanimity rule as interpreted by the Council block action. With or without a legal veto, the opposition of a great Power slows up the League's machinery, while under the same conditions a small Power can often be induced not to use its veto. This new procedure being provided under Article 19, it would not be subject to the restriction concerning matters solely within the jurisdiction of one party, which paragraph 8 of Article 15 puts on invocation of that article to provide for territorial transfers. The remaining machinery suggested by Professor Wright, the commissions of investigation on the spot, plebiscites, and reference of legal questions to the Permanent Court, may be utilized as suggested.

There appear to be several advantages to this plan over both Article 19 as it now stands and as modified by Professor Wright. It eliminates the need to develop entirely new procedures for the Assembly. It follows closely the lines of established international custom, which should facilitate its adoption, and its practical functioning. It solves the problem of what Powers should participate in revision, assuring the participation of those with an interest. It protects the position of the small Powers better than did the Concert. It provides special means for dealing with two particularly perplexing questions, that of territorial titles and that of limitations on freedom of action by treaty, and should therefore tend to reduce the frequency of resort to threatening or belligerent action or to questionable legal arguments to secure consent to change. Like Professor Wright's plan, it would permit a political body to handle the political problems involved, with power to refer legal questions to the Permanent Court, thus avoiding the objection raised by Judge Kellogg in the Free Zones Case.

We appear to be now in a period similar to that of 1830, 1848, and

1864–70, when States are shaking themselves free from treaty provisions they consider no longer applicable. This should be followed by a period when there will be less occasion for frequent application of the suggested procedure, giving a chance for experimentation to determine its workability. Finally, its establishment might tend to hasten, instead of waiting on the attainment of, the security which Professor Wright considers an essential prerequisite to the application of Article 19.

Chairman BUTLER. The discussion will be continued by Mr. Chesney Hill, Assistant Professor of Political Science and Public Law, University of Missouri.

Mr. CHESNEY HILL. I have only one or two remarks to make on the basis of Professor Wright's paper. He did not go into detail regarding the doctrine of *rebus sic stantibus*, and I believe that it provides no solution of this problem of international law. Furthermore, I believe that it should be realized that not all treaties present a problem. It is not in the case of all treaties that this problem of termination of treaties by some elaborate international procedure arises. The great majority of treaties covering most of the non-controversial subject-matter are cared for by the treaties themselves, either by the provision of a short term for the treaty or by the inclusion of a clause permitting denunciation after a certain length of time, as Mr. Wright has indicated.

It was pointed out this morning that the problem is in the case of certain treaties which are non-reciprocal in nature, particularly those which limit the freedom of action of a State on one side, especially in respect of the actions which a State may take within its own territory. A second problem of international law, which is envisaged in Article 19, is that of the transfer of territory, and this is popularly called revision of treaties. It is particularly in these treaties which limit the exercise of sovereignty of a nation within its own territorial jurisdiction, and which mark national frontiers, that we have these problems. Obviously the sensible solution, if we had sensible people drafting treaties, would be to avoid the problem in the first place.

It is obvious from the background of the drafting of Article 19, which was originally closely related to Article 10, that it was hoped that Article 19 would provide a method by which there could be a gradual revision of provisions of the peace treaties during a period of more friendly relations and of a calmer atmosphere than that of the drafting of the Treaty of Versailles.

This hope has not been realized. The result of interpretations placed upon Article 19 by the members of the League through Assembly resolutions has been to weaken the provisions of Article 19 and to make it practically impossible to use the Assembly as a method of revision of treaties. I do not believe that the solution is to follow the suggestion of the last speaker of giving primary influence to the great Powers; because it is chiefly the great

Powers who employ the more forceful means of revision and take the risks of opposing the other nations of the world. The situation would be that of one great Power trying to terminate its treaties, and facing other members of the Council who would also be great Powers, with some small ones.

In so far as Article 19 at present facilitates peaceful change, it is only because it gives additional weight to the views of a good many members of the League of Nations. Whether it requires unanimity or not, it is clear that under the present interpretation the resolution of the Assembly is only advisory. In this type of question where there are no principles of law to guide the parties who want revision of treaties, that is, to guide them as to what the new agreement shall be, one must depend upon the parties to a treaty to make a new agreement, subjected to political pressure in the sense of having other nations express their point of view. That can be done by means of Article 19. It may be that unanimity is unattainable, but if a large number of nations agree to a resolution advising the revision of the treaty, it seems to me that it would be highly advantageous in promoting peaceful changes. On the other hand, I believe that it would be undesirable to call upon the Permanent Court of International Justice for an advisory opinion, because there are no rules of law in existence which would solve these problems, and it would be unwise to place such a burden upon the court.

Professor JAMES W. GARNER. I am sure we all appreciate the desirability of peaceful and orderly process for changing treaty situations which have become very burdensome to one or more of the parties and dangerous to the peace of the world. But, as the last speaker has suggested, I think the present treaty framework of the world is not nearly as rigid and inflexible as many people seem to believe. As he pointed out, a large number of treaties today are for very short periods of time, many of them for one year. And the parties, of course, are under no obligation to renew them. In the second place, a large number of treaties contain denunciation clauses. In the third place, an increasing number of treaties contain provisions for their own revision. Of course, there are some treaties the effectiveness of which would be very slight if they were concluded for short periods of time or if they contained denunciation clauses under which they could be terminated any time at the will of one of the parties. But I submit that this class of treaties is relatively small. So the remedy is with the States themselves. If they do not want a rigid treaty situation, all they need to do is to refrain from entering into treaties for long periods of time; they have only to insert in their treaties denunciation clauses and revision clauses.

But there is a class of treaties which makes the trouble. Those are treaties which have been imposed upon the parties on one side, and particularly treaties of peace. And it is from those States in Europe today that the complaint which has started all of this agitation comes. Such treaties obviously do not contain denunciation clauses. For obvious reasons they can not be concluded for short periods of time. They must be indefinite

or perpetual in duration, otherwise they will have little value. The only way I see out of such a situation would be to establish some sort of supervision or control over the making of treaties of peace, to set up some organization or régime which could veto the action of peace conferences. Obviously that is rather a large undertaking, and I see no likelihood of its going to be done in the near future.

The doctrine of *rebus sic stantibus* affords no remedy for getting the world out of this situation because, as the doctrine is usually interpreted—certainly by the best writers on international law—it applies only to executory treaties; it does not apply to executed treaties, such as treaties of cession. The doctrine of *rebus sic stantibus* does not provide any means for undoing treaties of peace and reëstablishing the *status quo*. The same thing may be said of Article 19 of the Covenant, which applies only to executory treaties and only to those which have ceased to be applicable. And, as interpreted by a committee of experts of the League, that means only those treaties the execution of which has ceased to be reasonably possible. That leaves a very small category of treaties which Article 19 envisages.

So, Mr. Chairman, it seems to me that until the world is ready to set up some system of control over the making of treaties of peace, there is no remedy, no means of escape from the situation created by such treaties, except by negotiation, by argument, by appeals from the parties which live under the incubus of such treaties.

(Here the gavel fell.)

Professor ELLERY C. STOWELL. Mr. Chairman, I ask unanimous consent that Professor Garner be allowed three minutes more in order to finish up what he has to say.

Chairman BUTLER. Does the Chair hear any objection? Hearing no objection, Mr. Garner has three minutes more.

Professor GARNER. I was going to say, Mr. Chairman, that the policy of the German Government during the period of the Republic, and particularly during the administration of Dr. Stresemann, showed very clearly that this remedy is not a hopeless one. As was pointed out last night in the excellent speech of Professor Moon, the Republican Government of Germany induced the Allies and the associated parties to the Treaty of Versailles to consent to a rather long list of changes in that treaty, and some very important ones. And there would have been other changes if the Government of the Republic had remained in power. But when the Nazi Government came in it adopted a different policy. It repudiated the League of Nations; it withdrew from the Disarmament Conference; it repudiated the policy of conciliation and arbitration and resorted to the policy of delivering ultimatums. The result was that the other parties to these treaties were not willing to consent to changes in the treaty that were dictated to them in such manner as that. Dr. Stresemann and the other statesmen of the Republic were put on the list of traitors; and if Stresemann were alive today I fancy that

he would be in a concentration camp with some of the other Republican leaders.

The success of Russia furnishes another good illustration of the point I am making, namely, that it is possible by argument and negotiation and by a policy of conciliation to bring about changes in treaties which no longer conform to the new conditions under which they have to be applied. Russia succeeded in inducing at least a half-dozen governments of the world, including Japan and France, to consent either to the abrogation of existing treaties between Russia and those countries, or to their reëxamination. That included all of the Japanese treaties, in fact, except the Treaty of Portsmouth, which was a treaty of peace.

Chairman BUTLER. We still have quite a little time left for discussion.

Professor CHARLES E. MARTIN. I am somewhat disturbed by the fact that we are not coming to grips with our major problem, *i.e.*, the State which will not submit its aggressive aims to the conciliatory agencies of the world for settlement. I am very much concerned about what has happened to the treaty structure which has been established by the Washington Conference of 1922; about what is happening to the League of Nations and to our institutions of peace. Neither Japan nor Italy is a defeated country. No treaty has been imposed upon them by force. I would like to know, and I would like for us to consider, what is to be done with a country which makes an aggressive demand and insists that either the world shall agree to its demand or there shall be no consideration of it. That is the dilemma in which we find ourselves. Are we forced to admit that we have reached the stage where some disputes or some controversies cannot be or will not be submitted to conciliation? This is our major concern. These discussions have been splendid and they point the way; but I believe Professor Fenwick is just ready to come to grips with this question.

Chairman BUTLER. The Chair recognizes Mr. Fenwick.

Professor CHARLES G. FENWICK. Mr. Chairman, I never yet turned down a challenge. As I see it, law within our community maintains justice or secures justice in two ways. In the first place, it protects the *status quo;* there is to be no change by violence. If there is to be any change it has to be through orderly procedure. The courts are an agency of that orderly procedure. But their function in making changes is very limited. I do not see that even our equity courts can go very far. Take a case of foreclosure: an equity court enforces something called equity, which is a little easing-up on the rigorous terms of the contract, but it does not go very far. Unless we had a legislature which could intervene and change the fundamental principles of the law, we should have endless violations of law in our community. You could never keep the peace by maintaining the *status quo* unless a legislative body were there to change the whole legal situation and create a new set-up so as to take away the motive to violations of law on the part of those to whom the continuance of the *status quo* is an intolerable burden.

Turning to the nations, I do not see, although perhaps I misunderstand Professor Yntema on this point, that the assumption of an equitable jurisdiction by arbitration courts could really help the situation. What we need today is some very fundamental economic changes in the relations of States. Let us take a simple proposition. It is believed that certain boundary lines in Europe could be relieved if you could create a neutral trade zone, let us say, for example, between Hungary and Rumania. But assuming that a neutral zone fifty miles on each side of the boundary might ease that tension, could any court exercising equity jurisdiction do that? No; it is not possible. That calls for legislation. Therefore, I say that the League of Nations or some new and better League must do it. It is clearly a problem of international legislation. Change of that kind, the urgent changes of law between nations, must be by a fundamental altering of principles and a fundamental approach to the economic problems.

Coming to Professor Martin's problem, I suppose the history of the growth of law within the individual State tells us that you must always control and generalize a particular grievance. If you are going to meet every possible grievance from every quarter, quite obviously the stability of order, which is one of its essentials, will have to be set aside for endless change. That will not do. It seems to me our problem is to try to take grievances and generalize them. Let us suppose today a country like Italy or Germany, lacking in certain raw materials of industry, has a grievance. I do not believe we shall ever adequately meet that grievance by taking it as an isolated grievance. I think we should try to generalize the grievance and regard it as something we must raise to the point of a principle. If we can meet it in that way, by trying to create principles which take into consideration this grievance and that grievance, there is a way out. It seems to me the Society ought to emphasize very strongly the need for a radical approach to the problem of change. Stability is absolutely essential, but stability must be accompanied by a frank facing of the necessity of fundamental economic changes. And that is where we have been weak thus far.

Mr. Francis Deák. I beg to rise as a matter of personal privilege, due to the reference which Professor Fenwick made. I would like to say, first, that I do not intend to tear him apart at all. I think Professor Fenwick was somewhat mistaken as to my views. As a matter of fact, I have to make a confession. I absolutely do not believe that the revision of the boundaries of Hungary alone would solve all the problems at present pending between Hungary and her neighbors.

I believe the discussions concerning the peaceful revision of treaties by application of the doctrine of *rebus sic stantibus*, or through Article 19 of the League Covenant, have been somewhat unrealistic. There are questions of prestige involved, and I have not heard that word "prestige" mentioned, Mr. Chairman. Now, I have happened recently to go through heretofore unpublished documents, among others, of the Crown Council meetings of the

Austro-Hungarian Empire in the period 1907 to 1911. You would be surprised at the hundreds and thousands of times the word "prestige" appears. I do not see how questions of "prestige" between Hungary and Rumania, or Germany and France, Japan and China, or Japan and the United States, can be settled through Article 19 of the Covenant.

I also would like to ask one question of Professor Garner. I have been deeply impressed by his argument; but, again, I suggest that he was somewhat unrealistic, which greatly surprised me because I believed that Professor Garner's knowledge of international law is only equaled by his realism. And I want to ask him this question: while it is true that Germany was successful in effecting changes by conciliation and negotiation under the Republican régime, and Russia was able to obtain some changes by similar methods, does he think that the same result could be attained by a country as poor as Austria, let us say, negotiating with Germany, or as weak a country as Bulgaria negotiating with Yugoslavia, or Korea with Japan?

Chairman BUTLER. The Chair will recognize Mr. Garner again, if there is no objection.

Professor GARNER. I would rather hear from somebody else.

Professor GEORGE GRAFTON WILSON. Mr. Chairman, may I have five minutes?

Chairman BUTLER. Professor Wilson is recognized for five minutes.

Professor WILSON. The title of this discussion appealed to me because it is "International law as a hindrance and as an aid to peaceful change."

Chairman BUTLER. May I interrupt the speaker? That is not the subject of discussion now. The subject of discussion now is the eleven o'clock discussion, "Article 19 of the League Covenant."

Professor WILSON. Well, please count out that time, because I am going to speak on both; and I think both of them should go together.

If you notice in the recent correspondence and in the statements of Mr. Hitler, he uses the term "automatic" sanction. The advantage of an automatic sanction is that it works first and you argue about it afterwards. Many of these sanctions about which we have been talking, Mr. Chairman, you argue about and then it does not work at all. That, I think, was illustrated this morning.

Out in one of the Hawaiian Islands, there was a cross-road in regard to which they made certain regulations in order to avoid collisions, but these did not work. Later on they placed a policeman there. That plan worked fairly well, but drivers made remarks to the policeman that were uncomplimentary and they were taken back to town by him to explain their remarks, and they were sometimes fined. That went on for a while, and then someone decided that what they would like was an automatic sanction and not a policeman and not legislation. Therefore, they put a dip of about eighteen inches in the road and put a sign five hundred feet away reading "dip 500 feet ahead." On the other side they put a bump and a sign, "bump 500 feet

ahead." They removed the policeman; but the sanction worked every time.

Chairman BUTLER. Is there any further discussion?

Mr. THEODORE MARBURG. In the Bryce Plan, which the American League to Enforce Peace followed in this respect—Dr. Wilson was a member of that group and will recall it—there was one institution which was not adopted at the Versailles Conference, namely, a Council of Conciliation. The present Council of the League is quite a different body. They are official representatives, and it is more or less an executive body. The element of national pride enters in when a question is brought before them. The Council of Conciliation was a large body which had power to hear and make recommendations on non-justiciable questions; its sole duty was conciliation. You now have the International Court of Inquiry set up by The Hague Conference of 1899. But that has not been used since the Dogger Bank affair, in which, however, it was very effective. Its duty is simply to inquire into and bring out the facts; and very often bringing out the facts serves to still unjust practices.

This conciliation body to which I refer is, again, different from an arbitration. When you enter into arbitration you arrange the *compromis* and obligate yourself to abide by the decision of the arbitral court. In conciliation there is simply a getting together through discussing the question and bringing out the facts. I think the world will have to come to that original notion of Lord Bryce, urged by our American group, and set up an International Council of Conciliation.

Chairman BUTLER. We still have a few minutes left before time for adjournment. Is there anyone else who wishes to speak?

Secretary GEORGE A. FINCH. Mr. Chairman, encouraged by Professor Wilson who was on the platform with me, I would like to ask for a few minutes in which to say something on this subject.

I do not see that there is much hope for any organization of the world which may be made to depend upon the nations agreeing in advance to permanent boundary lines or settling any of the other problems which have been suggested as being involved in the determination of boundary lines. Neither can we ever expect the nations of the world to agree in advance upon a code of law. If we expect to postpone the bringing of more order into the international world until we can agree in advance upon the law, I think we might just as well give up our jobs. Our only safe guide is to try to accomplish in a wider sphere what we have accomplished in our national spheres. There are no problems between individuals which cannot be settled by a court. We do not recognize any distinction between justiciable and non-justiciable questions in our private relationship one with the other. But there are many unforeseen disputes which arise for which we automatically provide in our courts the method of settlement without anybody knowing in advance what the law applied will be. As a matter of fact, that is why we go into the courts so many times in our civil litigation,

because we do not know what the law is, or we have a mistaken idea as to what it might be.

I think we shall have to depend upon devising some acceptable method of settling disputes, no matter what they are, and in doing that I think we shall have to eliminate the political element from the body which is set up to settle those disputes. To my mind, that is the present great weakness of the League of Nations. I think it has referred too many things to the Council of the League. The Council of the League, which is a political body, exercises too much jurisdiction over questions which should be submitted to some body where international politics do not have too free a play.

A few Sundays ago I was in Baltimore and took part in an open forum discussion on the Italian-Ethiopian dispute. There was a representative of Italy there, and practically his only argument was that Italy refused to submit the matter to the League of Nations because it was a "packed jury."

Professor FENWICK. Do you think Italy would submit to anybody?

Mr. FINCH. You may answer that in your own time. The same thing, to my mind, applies to sanctions. When we apply sanctions in private law it is only as a judicial process. When a man commits a murder, we do not execute him summarily without giving him a trial at law, except where resort is had to lynch law. Sometimes I think we give criminals too much of a chance; but we do go through the legal process, and when we finish with the accused he has no claim that he did not have his day in court. It seems to me we shall have to aim more for that object in any international body which decides these questions between nations.

Professor FENWICK. This is very interesting. Does he think Italy would have taken her case to the Permanent Court or to some other body of conciliation? Does he think Italy was ready to arbitrate? Does he think she really did not want to go to the Council of the League because that was a packed jury, but was quite ready to go to any impartial jury? Can he suggest any kind of jury Italy would have thought impartial?

Secretary FINCH. I cannot speak for Italy. I am simply giving the objection as given by the Italian representative. I have a suspicion there was a great deal in what he said. I do not care to bring up in a thirty-seconds discussion the Italian-Ethiopian dispute; but the whole history back of it is filled with suggestions that there was a great deal in what the Italian said. If they had had some body to appeal to other than their former allies in the partitioning of Africa—

Professor FENWICK. What kind of a body?

Secretary FINCH. I would say the court at The Hague. If they had been called upon to submit their case to a court rather than to a council which they considered a packed jury, I think they would have had less ground for objecting to the procedure which the world asked them to accept.

Mr. MARBURG. What Mr. Finch has in mind is illustrated better by the Corfu Affair, when Italy said it was beneath her dignity to appear before the

Council of the League but was ready to have the matter considered by the Council of Ambassadors at Paris.

Professor QUINCY WRIGHT. Mr. Finch suggested that the trouble with Italy was that the jury was packed. I was not aware that Italy had referred to any principle of law in her claims to take Ethiopia. It seems to me dubious whether she could have appealed to an utterly impartial World Court or utterly impartial Hague Tribunal of Arbitration and expect such a tribunal to say she was entitled to deprive Ethiopia of her existence as an independent State. That was what she wanted. This emphasizes the distinction I tried to make between the process of eminent domain in international affairs and the process of appeal to law or equity.

As I conceive it, the only principle Italy might have appealed to was that for the good of the family of nations as a whole Ethiopia ought to cease to exist, or at least a large part of her territory ought to be transferred. It might be there would be some case there. Possibly the Ethiopians are a backward people. Sometimes an individual has to give up his farm in order to permit a railroad to go through. It might be in the interest of the world as a whole that Ethiopia should not continue to exist, or should have her territory sacrificed for a broader interest.

I cannot see how such a principle can be developed in international law except by analogy to the right of eminent domain. That means changes of rights on the basis of political rather than juridical considerations. After all, the final decision as to whether a particular piece of land shall be confiscated and given to a railroad or the State is a political decision. It depends upon where you want the railroad or the public building to be.

Of course, there are certain judicial checks. We might contemplate, in international law, that eventually the question of the propriety of the political decision of the League of Nations that this right of eminent domain should be exercised, should be placed before a court with the sole issue before the court of whether there is an actual showing of public necessity and whether there is some material compensation to the country that is required to give up a right. But the initial decision, by its nature, is a political decision.

If we are going to meet emergency situations for the preservation of peace in the interest of the community of nations as a whole, I think we will have to contemplate the recognition of some such principle.

Chairman BUTLER. Gentlemen, there is one minute left, and the Chair will take that.

In connection with the citation of rules on the second page of the program I have one suggestion to make to speakers. After many years' experience with the Supreme Court of the United States, I have often been called upon to help in the preparation of petitions of *certiorari*. Almost invariably I turn the petition upside down and put the last point first. Generally they work up to a climax. If the speakers who are limited as to time will put

their last point first, then they will be able to get off the real gist of their remarks and will not be disturbed by having part of their address eliminated, perhaps, because of lack of time.

The rules of this Society are really very strict. They are not limitations on the speakers only. The Society has put the limitations on the presiding officer. That is the reason the presiding officer has to be strict about the time. Presiding officers would be subject to impeachment for violation of law otherwise. And you know what happens in cases of impeachment. Even so, one may be popular as to six or seven different subjects but may be wrong as to one and may be impeached. Therefore I think the presiding officer ought to be sympathized with in carrying out the strict rules of the Society.

The meeting now stands recessed until two o'clock.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 2 p. m.)

THIRD SESSION

Friday, April 24, 1936, 2 o'clock p. m.

The Society met, pursuant to the recess, at 2 o'clock p. m., Professor GEORGE GRAFTON WILSON presiding.

Chairman WILSON. The session this afternoon is to be international both from the point of view of the statement of the problems of population as well as from the nature of our first speaker. We are very glad to welcome Professor Norman MacKenzie, from the University of Toronto, who will speak on "Problems of populations and persons."

Professor MACKENZIE. I may say that I was a little puzzled as to the best approach to this particular problem, whether to deal with it in a general way or to take certain specific cases and situations occurring in a particular country and apply the general principles, as I understand them, to the particular cases. After due consideration, I came to the conclusion that, as the other two gentlemen taking part in our discussion this afternoon will probably take up some of the particular aspects, it would be better if I in opening kept pretty well to the general.

PROBLEMS OF POPULATION AND PERSONS

By NORMAN MACKENZIE

Professor of International Law, University of Toronto

In discussing these questions, I assume that the general desire is to improve the position and increase the opportunities of the individual, and at the same time to lessen the possibilities of friction and conflict between States, in so far as these are the concern of international law; in other words, a consideration of the rights and duties of individuals and of States in respect of these matters, together with such suggestions in the general interests of States and individuals as seem feasible.

There is some question, of course, as to the propriety of considering the individual in a paper on international law. But as the individual is in every case the ultimate victim or beneficiary of the action of States and of international law, it seems desirable to consider every situation and suggested change in the light of its effect upon the individual, as well as upon that collectivity of individuals, the State. An example of the theory that the individual is a proper subject for consideration by international lawyers occurs in the sometimes alleged right of the individual to travel freely or to emigrate from one country to another. In 1858, for instance, the United States and China "proclaimed the inherent and inalienable right of man to change his home and consequently recognized the right of nationals of either contracting

party to emigrate from or immigrate into the territory of the other party for the purpose of visiting the country, or trade, or as permanent residents." Martens, too, in 1883, included among his "imprescriptible rights of man, the freedom of emigration and intercourse." Today, however, it is generally agreed that the individual as such has no rights of this nature, although the attempt by one State to prohibit the entry into its territories of the citizens of all other States would not be in accordance with international practice, while the complete prohibition of the entry of the citizens of a particular country would be considered an unfriendly act, and would probably entitle the "injured" State to resort to reprisals.

The problems of population, however, either lack of population in developing countries like those of the Western Hemisphere during the nineteenth and early years of the twentieth centuries, or alleged overpopulation as in the case of Italy and Japan today, are essentially the concern of States. In regard to them, all States insist that they are domestic matters, over which they alone have jurisdiction, and this view has been generally accepted. Fenwick, for instance, in his recent treatise on *International Law* states that it is a well-established general principle that a State may forbid the entrance of aliens into its territory or admit them only in such cases as commend themselves to its judgment. In support of this he cites the opinion of the United States courts in the case of Nashimura Ekiu that "it is an accepted maxim of international law that every sovereign nation has the power as inherent in its sovereignty and essential to self-preservation to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may seem fit to prescribe." The International Labour Office, too, in its collection of *Migration Laws and Treaties* gives ample evidence that this principle is accepted by practically all States. Some of them, in their desire to retain control over their man power, even go so far as to prohibit emigration from their territories. On the other hand, there is a belief that emigration is one of the natural solutions of problems like unemployment and the pressure of population. This view is reasonably expressed by Signor de Michelis in his book *World Reorganization on Corporative Lines*. He states that unemployment ought to be remedied by the normal flow of emigration (p. 45), and further that "no one can fail to see what an indispensable automatic or almost automatic regulator of world economy the war has shattered by interrupting the flow of migration."

As to which of these two principles, freedom of migration or complete State control of migration, is in the interests of the individual and of international society, my own view is—perhaps because I am a citizen of an immigration State—that the complete State control of migration is the more desirable of these two principles and the only one consistent with the existing state of society, national and international. Certainly there would be resentment in immigration countries if countries of emigration refused at all times to permit their citizens to emigrate to new and developing lands. And it is even more

certain that countries with surplus population, will press—particularly in times of economic difficulties—for the possession of colonies to which to send this surplus population or these unemployed, or for the right of sending them to the newer and more sparsely settled lands overseas. But until such time as there is a far greater degree of international coöperation and control than is evident at present, it seems wise as well as certain that countries of immigration should insist on the right to select as between individual immigrants, to discriminate in favor of certain nationalities or races, to deport those who prove undesirable or to exclude immigrants altogether.

Many aspects of this problem of population, such as government encouragement of high birth rates, access to raw materials and markets, tariffs, birth control, possession of colonies, and others lie in the fields of sociology, economics or politics, and while they are of the utmost importance, I do not propose to deal with them. But in justification of my statement that the control of migration by the countries of immigration is desirable in the present state of society, may I point out that the "melting pot" or the juxtaposition or intermingling of considerable bodies of persons of differing race, color, culture or religion does not necessarily make for an absence of violence or the individual good. In support of this may I cite the treatment of the Jews in Germany, the Negroes in the United States, Asiatics in both Canada and the United States, incidents like the Indian Mutiny, the anti-foreign agitation and action in China, the exchange of populations in the Balkans and between Greece and Turkey following the war, and the continuing problem of minorities and refugees in so many European States. Thus, in my opinion, all the present day evidence points to the desirability of promoting, in fact permitting, only the immigration of carefully selected individuals from such racial and cultural stocks as seem likely to be absorbed into the life of their new home-land with a minimum of friction. This may seem an unfair attitude to take in view of the difficulties of the oriental nations facing a world of colonies and dominions controlled almost exclusively by "white" nations. But there is real doubt as to the importance of immigration as a solution of the population problem, and, as indicated above, it does not always make for peace, either national or international.

Having laid down this general principle of restricted immigration, may I make a few detailed suggestions of a practical nature.

The first, that while insisting on the right to control and exclude immigrants, every consideration in legislation, administration, and practice should be given to tourists, business men, students, and others, the nature of whose residence within a country is of a temporary character.

Second, that, if at all possible, no complete prohibition of any nation or race be made, but that when it is thought desirable strictly to limit or prohibit the admission of immigrants of a certain race or nation, this be done by means of an arrangement commonly known as a "gentlemen's agreement."

Third, that complete equality of treatment and opportunity, in so far as

this can be provided by law, be guaranteed to all immigrants who are admitted into a country. Practical illustrations of what is involved in these suggestions will occur to every one, but may I emphasize in particular the Chinese Immigration Act, so-called, in Canada, which is in fact an exclusion act and notoriously discriminates against the Chinese as compared with the Japanese, who are dealt with under a gentlemen's agreement; the discriminations of a legal character imposed upon all orientals of Asiatic origin in Canada, and in particular in the Province of British Columbia, in respect of naturalization, the franchise, admission to certain of the professions, and into certain industries; and while it does not become a guest to comment in critical fashion upon the laws of a friendly State, may I suggest that your treatment of the Chinese and Japanese is not all that it might be in this respect. Better far, in my opinion, to prohibit the entry of such immigrants altogether than to make of their presence an open sore within the State and internationally by refusing to accord them equality of status and opportunity when they have been admitted. One other point might be noted, though it, like birth control, is a problem of sociology rather than law, and that is the refusal to admit females of certain races, while continuing to admit males. This almost certainly makes for immorality and is likely to arouse race antagonism.

If the "gentlemen's agreement" seems undesirable or politically impossible, attempts should be made to negotiate a treaty with the country or countries whose nationals are deemed undesirable for immigration purposes with a view to arranging complete equality of treatment for the nationals of the excluding and the excluded States. The purpose of this would be to lessen the sense of insult or affront, and to increase the numbers of those in more desirable categories, such as business and professional men, students and tourists, who might visit each other's countries for an arranged period, and to simplify the formalities of entry and travel of such classes. In view of the fact that discrimination often continues against such groups even after they are naturalized, or become citizens through birth, it is worth examining the possibilities of an arrangement by which both States would agree to exclude each other's citizens from the classes of those who can acquire each other's nationality. These would then continue to come within the terms of the suggested treaty in respect of their rights and treatment.

On the other hand, if standards of the kind I have suggested are to be observed by immigration countries, there is a corresponding duty on the part of countries of emigration. The first is, the recognition of the fact that immigration countries have social and economic problems of their own, and are not to be considered as dumping grounds for the criminally inclined, the physically or mentally unfit, or the unemployed; and that immigration countries have the right to exclude or return within a reasonable period (say five years) those who prove undesirable. Second, that the emigrant leaves his homeland to establish himself in a new country, and while it is inevitable that certain loyalties should persist, emigration countries should recognize the

nature of his relationship to his new home and the duties that this carries with it. This conflict of duties or loyalties occurs in a variety of cases, the most common of which are in disputes over naturalization and nationality, military service, dispatching or taking out of the country of money earned within it, and participation in political movements having their origins in the emigration countries.

In the main, the problems arising out of naturalization and military service have been dealt with on a basis of compromise. But there is a case to be made for those who question the right of an emigration nation to order its nationals—immigrants resident in another State—to report for military service. However, since the emigration State cannot take steps to enforce its demands on its former citizens, this problem is not serious save in cases where the immigrant returns on a visit to his country of origin, when he may be arrested for desertion or otherwise dealt with.

Problems arise, too, in the case of countries which refuse to recognize the right of expatriation on the part of its citizens or their children. Here, in my opinion, the claims of the immigration country are dominant, and should be upheld in all cases, even those in which an individual may have emigrated to avoid military service.

The dispatch of earnings by the immigrant to the homeland while it may, and probably does, adversely affect the community in which he lives, may be in the general interests of both emigrating and immigrating countries, in that it may help to equalize unfavorable trade balances and improve economic conditions.

Examples of the injection of political issues of foreign origins into immigration countries have been common enough since the war, and have their origins in the conflicting forms and theories of government which exist at present, notably democracy, fascism, nazi-ism and communism. Within the last two months the actions of both the German and Italian Consuls-General in Canada were under fire in the House of Commons at Ottawa. The German official was exonerated in that his actions were confined to notification of German citizens in Canada to register themselves for military service, but the Italian official received a severe reprimand. The activities of the communists, too, have been a constant source of irritation to rightist governments everywhere. Obviously if countries expect to be accorded the privilege of sending their citizens to other countries, they must refrain from interfering with the politics and government of those countries.

Turning now to another aspect of this question, namely, deportation: In principle, this is a right which all States insist on and all States concur in, but it is one which should be carefully restricted both in the interests of individuals and of good relations between nations. In the first place, there should be a limit to the period within which an individual can be deported. I have in mind, for instance, the statement of a former Minister of Immigration in Canada made to me, to the effect that although he was a British subject by

birth, and had resided in Canada for some forty years, he was in certain circumstances still liable to deportation. The law has since been amended in this respect, but aliens, and even naturalized citizens whose certificates may be cancelled, are still liable to deportation for certain causes, at any time. This right or power has been particularly open to abuse in recent years because of its use in getting rid of unemployed and those whose political views are not in accord with the government of the day. The many cases of communists and other radicals who have been deported are common knowledge, as are the difficulties often arising because of the breaking up of families owing to one of the parents being deported.

Certain suggestions occur to me, which might improve the situation in respect of deportation, among them: The establishment of a definite period (say five years) within which every immigrant might be deported for reasonable cause, but after which he would not be liable on any grounds whatever save fraudulent entry into the country. Another is according the deportee the option of being sent back to some other country than the one of his origin, provided always that there is another country prepared to receive him. This is particularly desirable when the deportee's political views are at variance with those held by the government in the country of his origin. At least two cases occur to me, of communists deported from Canada to Germany and Yugoslavia, respectively, whose future on their return was at best a very hazardous one.[1]

Leaving the question of immigration and deportation and turning to that of nationality, one finds three principal issues—naturalization, double nationality, and statelessness, which cause difficulty and lead to confusion. Naturalization has already been referred to in connection with immigration, and I propose to do no more than make two or three suggestions in regard

[1] One peculiarity of the Canadian law is perhaps worth mentioning. It arises out of the existence of three different and in some respects conflicting statements on somewhat the same subject. The first is the Immigration Act, which defines *Canadian citizen*, *Canadian domicil*, and authorizes the immigration authorities to exclude or deport certain classes of individuals. The second is the Naturalization and Status of Aliens Act, which defines *British subject* and provides for the naturalization of aliens. The third is the Canadian Nationals Act which defines *Canadian nationality*. The conflict is due to the fact that (a) while all Canadian nationals are British subjects, all British subjects are not Canadian nationals, (b) while all Canadian citizens are British subjects, neither British subjects nor yet Canadian nationals are necessarily Canadian citizens, and both, under the terms of the Immigration Act, may be kept out of Canada. One rather unusual result is that a Canadian citizen, either British born (outside of Canadian territory) or a citizen by naturalization, who leaves Canada and resides for a period of twelve months or longer in a foreign country—usually the United States—and who falls foul of the authorities there who proceed to deport him, may be refused admission to Canada because he has lost his Canadian domicil. However, as he retains his status as a British subject, he cannot in the case of naturalized citizens be sent back to his country of origin. The result is that Great Britain may find him landed on her shores, although he had never spent a day in that country in his life. This is, of course, absurd, and should be speedily rectified by the amendment of the Canadian legislation in question.

to it. The first is that naturalization be made as simple in requirements and as easy to obtain as possible, while maintaining adequate standards of intelligence and character. I have in mind particularly the discrimination often made on the grounds of race, or belief, in certain countries. I suggest this because I believe that every resident who intends to make his home in a community and nation, owes it to himself, to the community and to the nation to assume as speedily as possible the obligations of citizenship. The second is that naturalization once conferred shall not be withdrawn or cancelled, save for fraud in obtaining it or at the request of the naturalized citizen, and because of some fact, such as his return to his country of origin, which seems to make this desirable. The third is that naturalization, when properly conferred, be recognized for all purposes by the country of the alien's or immigrant's origin. Even though this might lead to attempts to evade military service or other obligations to the State by means of immigration, it seems in the general interest.

Mention should perhaps be made of the practice of certain governments in imposing citizenship upon residents, or even non-residents in certain exceptional cases, by the operation of law and without the consent of those affected. This naturally lends itself to friction and confusion, and should not be resorted to save with certain safeguards, *e.g.*, that it should apply only after a definite period of residence of considerable length and after the individuals in question had been given the opportunity of returning to their country of origin.

Double nationality usually arises out of a conflict of laws regarding the nationality of married women, the principle of the *lex loci*, and the *lex sanguinis* as applied at the time of birth, and in certain cases where expatriation may be denied by a country of origin. This is not always a hardship, and may even be an advantage, save in time of war, but it is a problem which should be settled, and settled in my opinion in favor of the country of domicil, where this is possible.

Amendments to national legislation in line with the Hague codification proposals of 1930 will go a long way toward taking care of those cases of double nationality or statelessness arising out of the conflict of laws controlling the nationality of married women.

The desire of certain States to retain control over their nationals and to refuse them the right of expatriation is another source of difficulty and should be abandoned, if these States expect others to receive their citizens as permanent residents. The practice of imposing the nationality of origin upon the naturalized citizens of other States who return to and have resided in their country of origin for short periods, is another leading to confusion, but in both these cases the difficulty can be lessened or avoided if the individuals in question do not return to their country of origin. Statelessness, however, has become a serious problem, particularly since the war, and is assuming even greater proportions in view of the tendency of certain governments to denationalize classes of its citizens at home or abroad, of which it does not approve.

The action of the Russian Government in denationalizing two millions or more of its former nationals, refugees in other countries, and the recent action of the German Government in its denationalization of Jews and others, both within and without Germany, is particularly to be deplored in that it affects such large numbers of individuals.

It is questionable, too, whether it is within the competence of a State *legally* to do this in view of the general understanding under which States receive aliens, namely, that they may deport them to their country of origin if they so wish. Further, it is contrary to the duty which a State may be said to owe to its nationals. At the same time it is practically impossible to prevent such action, particularly if the individuals in question have already been admitted to other countries, and are refused readmission to their countries of origin. It might give grounds for reprisals, however, in the form of a refusal to admit any further citizens of the denationalizing State. Perhaps the best immediate remedy for this situation is an extension of the system of the Nansen passports, together with a more general recognition of the status which that passport confers, for the purposes of residence and travel.

This whole problem of émigrés and refugees is a very difficult one and there is little that one can suggest, save to approve of the assistance offered the unfortunate victims by the citizens and governments of other countries. The logical solution would seem to lie in international coöperation and action. This coöperation would be directed to exerting pressure upon the government or governments responsible for the creation of the problem—but this might well increase rather than mitigate the suffering of the victims—or to organizing relief or colonization projects as, for example, in the cases of the Greek refugee relief, the Armenian relief, the settlement of Jewish refugees in Palestine, and the remaining Assyrians in Syria. All of these are obviously palliatives, but until such time as the international society is organized in a way to permit real pressure to be brought to bear upon an offending member, anything else seems of questionable value.

There is of course the possibility of improvement by means of international agreement along the lines of the minorities treaties,—which brings me to the problem of minorities. Here one should make a distinction between what I term "historic" minorities, and "incidental" minorities. To cite examples, the French Canadians in Quebec are what I term an "historic" minority; the representatives of the fifty or sixty races or groups that one finds in almost any Canadian or American city are what I term "incidental" minorities. To try and deal with these problems in the same way, or even to try and deal with either of them on the same basis as the minority problems of Europe, many of which came into existence as a result of the war and of the Peace Treaties, would be, in my opinion, a mistake. The desirable solution seems to lie in the methods followed in Great Britain (in dealing with the Scotch, English and Welsh), in Switzerland, in Belgium, or in Canada, where, while no one would suggest there is not a problem, the problem has been dealt with by

considering the minority as an integral part of the nation; and after guaranteeing them certain rights by law or practice in regard to language, religion, education, or other matters, trying to forget that they are a minority or any different from other citizens. In the case of "incidental" minorities, apart from guaranteeing them equality before the law, and freedom from discrimination in law or practice (where possible), no particular attention should be paid to them, and certainly no attempt should be made to guarantee them special linguistic or educational rights, for this would create intolerable confusion.

The minorities created by the war are guaranteed protection by treaties and by the right of appeal to the League of Nations. This was an attempt to deal in a legal and administrative way with a problem affecting the peace of nations and the welfare of individuals. It has been criticized on at least two grounds; one, that put forward by Poland in denouncing her minority obligations to the effect that this was a discrimination against Poland, as compared with certain other countries, and in this sense a derogation from her sovereignty. She proposed a general international minority treaty to which all nations would be parties to replace it. This, because of the differences in the minority problems themselves, and in the different countries, does not seem either feasible or desirable. A general international obligation to treat all aliens and even all citizens without discrimination, would be a good thing, but the problem of minorities is a special one requiring special treatment. The second criticism is contained in the statement sometimes made that the recognition and protection of minority rights internationally, particularly when the minority is related to an important neighboring State, tends to become a source of friction between the two States interested and to prevent or delay the coöperation of the minority and majority groups within a State. Both of these criticisms are worthy of serious consideration, for the problem of minorities is a problem affecting the welfare of individuals and the peace of the world. It requires special consideration and, in my opinion, the attempt to deal with it internationally, while far from perfect, was a step in the right direction.

The only other question I propose to touch upon is that of the legal status of the alien within a State. As pointed out above, this varies from country to country and within countries, depending on race, color, cultural background, economic standards or some other distinguishing factor. I do not propose to deal with these, save to suggest that it would contribute to the solution of our problem and the attainment of our goal were we to eliminate discrimination in law between alien and alien, and to provide equality of treatment before the law in respect of the protection afforded persons and property, including relief to the indigent and unemployed as between all classes of citizens and between citizens and aliens.

In conclusion, I would like to make a general suggestion as to the methods of dealing with these problems, and of assisting in their solution. As I have

already pointed out, practically all of them arise and exist because of conflicts between sovereign States as to their respective rights and obligations. The most direct and effective remedy is to have the necessary or desired changes made in national legislation. As it is desirable, however, that this legislation should have some degree of uniformity, the methods and practices of the International Labour Organization, and of the States members of it, in respect of conventions on social and industrial questions, suggest a valuable procedure. That is to convene an international conference or series of conferences of experts and representatives of governments who should draw up draft conventions on these topics. These conventions would then be submitted to the governments with a view of having them form the basis of amendments to national legislation.

In default of some such arrangement, the members of our profession, through their professional organizations and societies, can be of assistance in drawing up and making public such proposals as seem likely to be adopted by governments faced with the solution of these problems.

Chairman WILSON. The discussion will be opened by Mr. Durward V. Sandifer, Assistant Legal Adviser, Department of State.

Mr. DURWARD V. SANDIFER. A learned member of this Society who has had the experience of attending most of the meetings since the organization of the Society, button-holed me last night to offer a little advice to a neophyte on leading discussions before the American Society of International Law. He said, "Now, the thing for you to do when you get up there is to tear right into the speaker. It doesn't make any difference what he said; just rip his speech to shreds and jump onto him on all fours, and in that way you will stimulate discussion." I considered that very good advice and thought I would be able to follow it; but, unfortunately, I find I do not differ so violently on a sufficient number of points as to enable me to pursue such a belligerent procedure. However, perhaps there are some in the audience who will be able to make up that deficiency.

I have been greatly interested in listening to what Professor MacKenzie had to say in his very able and practical analysis of this rather broad and abstruse question, yet at the same time a very practical question, and to note that one striking fact is implicit in practically every point that he raises and practically every point that he discusses, and that is that the problem with which we have to deal in this field is not what international law prohibits, but what it permits. In other words, the problem with which we are faced is the regulation of all these questions, as Professor MacKenzie very well pointed out, by national legislation. He even went so far to suggest that probably the only solution is by securing uniformity in national legislation. But he pointed out that what we have to deal with here, or what seems to me to be clear from his analysis, is a virtual absence of international law, the States acting with practically unlimited power in most of the important problems.

Therefore, what we have to consider is what rules might be developed internationally, or what it might be desirable to develop or possible to develop where agreement might be reached. I am not saying that there is no international law in the field of immigration or emigration. But in the principal problems there is a decided absence of international law limiting the power of States. However, I do not consider that deficiency as important as it may be considered by some people. I want to suggest that it seems to me when you come to consider the extent to which these problems serve as a hindrance to peaceful change, the importance of a number of these problems has been greatly exaggerated as the cause of war or as an obstacle to peaceful change.

In the first place, in opening his discussion, Professor MacKenzie made an analysis of or discussed two conflicting principles. On the one side he speaks of the right, or the alleged right I believe he said, of the individual to move from place to place and his right to emigrate. On the other side there is the insistence of sovereign States that questions of immigration or emigration or regulations or laws with respect to nationality are domestic matters and that they have an unlimited right to control what persons shall come in or leave or be expelled or be deported from their territory. A survey of the various laws of States all over the world reveals the astonishing extent to which States have shifted to an emphasis on the second principle that Professor MacKenzie discussed.

Recently I examined reports from American consuls from sixty or seventy countries which were received in the Department of State concerning the limitations or regulations covering the right of aliens to work in foreign countries. In examining those laws and regulations I found that in practically every State, with the exception, perhaps, of some Latin American States, that there are regulations of varying degrees of strictness limiting the right of aliens to work. In practically every State aliens must secure work permits; and in most cases those permits are not granted unless it can be demonstrated that the alien will not compete with national laborers who are available.

In an article in the *American Journal of International Law* for October, 1932, written by Mr. Harold J. Fields, Executive Director, National League for American Citizenship, in which he pictures very graphically the closing doors of immigration all over the world, he shows that in Europe the doors are practically closed, and in the United States they are closing, in South America there are increasing restrictions, and in Asia and Africa they are open to some extent. Mr. Fields says:

> As I look at the regulations of the countries of the world affecting immigrants, I see in my mind's eye the building up of walled-in countries, much like the wall-encircled towns of the medieval period. . . . The development of international interests in our economic world seems to have sagged. In a sense, we are reverting to that stage in our history when our concerns centered solely around each of ourselves, nor took into account the needs of others.

In other words, restriction is the order of the day. Therefore, I suggest two questions for your discussion, or one question stated in two different ways. Is international law an obstacle to peaceful adjustment of conflicting interests to the extent to which it permits legal obstacles to be placed in the path of a free movement and exchange of populations? Is fluidity of movement the solution of population pressure and the threats to peace which arise out of such pressure?

If I understand Professor MacKenzie correctly, he answers both of those questions in the negative. He advocates that the right to regulate immigration should be definitely in the hands of the States, and believes that that is proper. He says that the intermingling of large bodies of persons of differing race, color, culture or religion does not necessarily make for the maintenance of peace or the individual good, and that there is real doubt as to the importance of immigration as a solution of the population problem, and that it does not necessarily make for peace.

Plenty of support can be found for that view. Sir Norman Angell, in a recent study on *Raw Materials, Population Pressure and War,* concludes that emigration can never be anything but at best a temporary palliative of the population problem, and asserts that practically every authority who has studied the question subscribes to this view. Professor MacKenzie, on the other hand, has quoted an Italian writer who states exactly the opposite view.

In looking through a book by E. F. Penrose entitled *Population Theories and their Application, with special reference to Japan,* I ran across this statement:

> The population problem in Japan will be most acute in the next two or three decades; after that the situation will be considerably eased. Imperialistic expansion can do little or nothing to improve, and it is possible that it may considerably aggravate, population difficulties in their most acute stage. On the other hand, expansion of exports, which also involves an expansion of imports that benefits other countries, would provide an adequate working solution of the problem. (p. 335.)

In other words, population pressure as a cause of war is greatly exaggerated. It is not, in my opinion a principal or primary cause of war except when complicated by other factors.

Now, can anything be done about this matter through the medium of international law? Does law offer any solution of this problem?

Professor MacKenzie has suggested three important lines of development, I think, and I would suggest that these three proposals he makes be erected into rules of law through international agreement, probably a conventional agreement through the procedure he outlined.

He suggests, first, that there should be a minimum of restriction of the movement of commercial people, business people, students, teachers, tourists, etc. The necessary exchange of ideas and goods should proceed without restriction. Second, that no complete prohibition of immigration of any one

race be imposed. I heartily endorse that. Third, that equality of treatment be accorded to all aliens, regardless of race or nationality. I think that is the most we can hope for at the present time. But if we could obtain agreement on those rules, it would go a long ways towards removing serious aspects of friction in this field.

One other problem which Professor MacKenzie discussed that I hoped to have time to discuss was that of expatriation. Professor MacKenzie says that if new legal rights are to be granted to peoples from countries of emigration, those countries will also have to accept new obligations. Of all the questions he discussed in that connection, I think that of expatriation is the most important as a source of difficulty and friction. I do not mean to say that the refusal of so many countries to recognize the expatriation of their nationals by naturalization in another country, except by consent, is a cause of war. It is, however, an irritant poisoning the relations of many States. In Europe, with countries living in such close contact, it is a source of real danger. In the United States it can be and has become so. Hyphenated citizens were not a creation of the World War. They exerted a tremendous influence on American policy then. They do now again with Europe seething with political unrest.

The source of difficulty is political. States hang on to their citizens because they want man-power. The ones with so-called "over-population" are most reluctant to relinquish claim to the allegiance of potential soldiers. Nevertheless, unlimited recognition of the right of expatriation would exert a real influence in inducing States to permit greater freedom in immigration. Even if it did not accomplish that, by eliminating contention and recrimination over questions of military service and protection it would perform a vital service.

The experience at The Hague Conference of 1930, however, shows the difficulty of agreement on such a principle. Article 7 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws adopted there, deals with expatriation permits and by implication recognizes the propriety of States requiring such permits as a prerequisite to loss of nationality through naturalization abroad. Such a principle marks retrogression, not progress, and is an obstacle to peaceful change.

Correlative with the principle of expatriation, however, is the question of the termination of nationality of naturalized citizens who go back to their native countries to reside; and if States of emigration are to recognize the right of expatriation, the States of immigration must at the same time, when those nationals go back to their native States, recognize that their naturalization accomplished thereby must be terminated if the person takes up a permanent residence in that State. It has been very difficult for the United States to secure agreements and naturalization treaties eliminating the problems of military service because of the fact that we have no satisfactory means of terminating the nationality of naturalized citizens.

I think an agreement on the general principle of expatriation would go

far towards removing the friction arising out of those cases where persons become naturalized in a foreign State without losing their original nationality.

I had planned to say a word about the matter of statelessness, but I believe Professor Preuss intends to discuss some of the matters I had in mind in that connection.

Chairman WILSON. The next speaker will be Mr. Lawrence Preuss, Assistant Professor of Political Science, University of Michigan.

Mr. LAWRENCE PREUSS. I shall accept the suggestion made by Professor MacKenzie in discussing rather more specifically some of the problems which arise out of statelessness resulting from legislation imposing denationalization as a penalty for political crime.

In no field of international law is the State more firmly entrenched behind its bulwarks of sovereignty than in that which relates to immigration, naturalization, citizenship and deportation. The right to control the composition of its own population, to determine the elements which shall go to make up its citizenry, and to eject those deemed inimical to the national interest, has been deemed so elementary as to be erected into a so-called fundamental right. The present-day insistence that questions of persons and populations fall within the sphere of domestic jurisdiction is merely a juridical expression of the heightened post-war nationalism and exclusivism which have raised grave and apparently insoluble problems in the field of the law of nationality. Nowhere are the effects of nationalism and political intolerance more evident than in the legislation now in force in several European States, whereby several millions of persons have been rendered stateless as a penalty for their failure to entertain the same political ideas as those of the government in power. The first wave of stateless refugees was cast upon foreign States as the result of the decrees of the Soviet Union and the Turkish Republic in the period immediately following the War. A second was caused by similar laws of Fascist Italy which provide for the denationalization of anyone who commits or assists in committing abroad an act directed towards the disturbance of public order in the kingdom, or from which may result damage to Italian interests or diminution of the good name and prestige of Italy, even though such an act does not constitute a crime.

Finally, Nazi Germany, in pursuance of its racial and totalitarian policy, has created a group of about 90,000 refugees, who are in fact stateless since deprived of diplomatic protection, and, in addition, about 5,000 stateless persons by application of a law of July 14, 1933, which provides for the withdrawal of German nationality from those who have by their conduct, contrary to the duty of fidelity to the Reich and the people, injured German interests.

A new wave of emigration coinciding with the period of general economic distress thus gives rise to an international problem of grave concern to every country called upon in the name of humanity to receive these refugees. Does

international law interpose any obstacle to such denationalization? Does it affect any solution to the problems thereby created?

It appears from the deliberations of the first Codification Conference, held at The Hague in 1930, that such action is within the competence of each State. So strong is the demand that this competence, this sovereignty, remain unimpaired that even the French delegate refused to join in condemning denationalization imposed as a penalty. And France has been the principal host to political refugees. Perhaps it could be branded as internationally illegal, as constituting an abuse of rights, since denationalization of citizens abroad impairs the right of the State of asylum to exercise its undoubted right of expulsion.

But even supposing that compulsory denationalization constitutes an international delinquency, this would advance us little toward the solution of the problem. For the State of asylum to insist upon its right to deport to their country of origin persons rendered stateless for political reasons would be to deny an elementary humanitarian duty expressed in the general rule that political refugees will not be extradited. What country of democratic government would expose a German refugee to the rigors of a German "re-education camp"?

Mr. James A. McDonald, in his letter of resignation as High Commissioner for Refugees (Jewish and others) coming from Germany, to the Secretary General of the League of Nations, has suggested a friendly but firm intercession with the German Government on the part of other States. There is ample precedent for humanitarian intervention, but can anyone familiar with the temper of the present government doubt that such intercession would render the condition of the refugees worse? A humanitarian appeal is necessarily based upon the assumption that considerations of humanity, of belief in the value of the human personality, irrespective of race or political creed, are entertained by the government to which the appeal is made. A common moral basis for a humanitarian settlement as between the States which have received these refugees and those which have created them is altogether lacking, and with it is lacking also the basis for a conventional regulation of the subject. Indeed, many will say that a conventional arrangement on so highly a "domestic" subject as that of nationality, if made with certain governments highly jealous of their sovereignty would prove quite as futile as other political agreements have been.

It seems to me that the problem is one to be settled among those States which do not subscribe to the notions of political intolerance which have created refugees. And yet there has been discernible an altogether natural tendency in these States to curtail the rights of asylum in yielding to economic necessities of their own. At the meeting of the Council of the League of Nations last January the French delegate warned that any increase in denationalization would be followed by a reduction in the number of immigration permits issued to German nationals. It is to be noted also that

German refugees have not yet received as favorable a status as Russian and Turkish.

The status of stateless refugees will come up for consideration at an international conference to be prepared by the next Assembly of the League. Vexing problems will arise which can only be settled by substantial sacrifices by the principal countries of refuge. The problem, I believe, cannot be "tackled at its source," as Mr. McDonald suggests. That would involve, for the countries which have created the refugees, the acceptance of a liberal humanitarian morality at variance with their "world-view," and emphatically repudiated by them. It can be solved only if the democratic nations will prove by their own conduct that their humanitarian professions are not mere words.

Chairman WILSON. We are now at the point where there is to be a discussion from the floor, and, if I might be permitted to suggest it, I think Professor MacKenzie could help us a bit. He said there was not a governmental disapproval of the conduct of the Germans, but there was a disapproval of the conduct of the Italians, if I understood him correctly. Will he kindly tell us just what the Italians did? I think it will help us a little in our discussion.

Professor MACKENZIE. The Italian Consul General, in a speech delivered to an audience in Canada composed of naturalized and non-naturalized Italians, made certain statements as to the attitude of the Canadian Government in relation to the League of Nations, which the Canadian Government considered to be an attempt to interfere with the policy of that government. The Prime Minister said that had it been done by a Minister, that is, by a diplomatic official, it might well have been a matter leading to his recall, but that as it was done by a consular official who was not in quite the same capacity, he thought his (the Prime Minister's) statement would be sufficient notice to him to ensure that he would not repeat his remarks. It was of that nature.

Chairman WILSON. As I understand it, the action of the German consul-general was merely one requiring registration of German nationals.

Professor MACKENZIE. Exactly, and the Prime Minister reported that such action was in line with accepted principles of international law.

Chairman WILSON. That is what we permitted during the war; and the representatives even gave them their fare home, provided they wished to register for transportation without enlistment.

We are now ready for discussion from the floor. We can have three speakers if each one takes five minutes, or five speakers if each one takes three minutes.

Mr. STEPHEN PAN. I am very much interested in the speech of Professor MacKenzie, and especially am I interested in the problem of the so-called Immigration Act. I would like to make it clear, however, that I have no special feeling of resentment concerning the act. I am simply discussing this problem from a purely academic point of view.

I would like to invite your attention to a consideration of international justice and equity. You are speaking of some sort of "undesirable element" concerning the immigration laws. I cannot find any special justification for this phraseology, in spite of the fact that each nation is competent to judge its own national problems. You can forbid certain elements entering your country. That is within the sovereignty of each nation. However, any regulation should not be harmful to other nations. One of the reasons why President Roosevelt has repeatedly said that the United States should retain a "good neighbor policy," is, to a certain extent, because he recognizes that a nation's welfare depends largely upon the welfare of its neighbors also. In other words, the welfare of your neighbor has a great deal to do with your own welfare. And I wish you would consider that, if you are trying to impose any regulation of immigration, you should be able to find some regulation which would be equitable to all races and colors. You might refer to a certain people whose customs are not the same as yours. That may be true. But this cannot solve the problem, because one man may be adaptable to a certain environment after residing in your country for a period of years. And when you are speaking of an "undesirable element" I would like to ask you, ladies and gentlemen, have the Chinese committed any serious crimes in this country? No, they have not. I am not accusing any other nationals of committing such crimes in this country. But I simply want to make clear that the Chinese have not committed them. And I wish those fair-minded international lawyers would uphold international justice and equity, when they are trying to deal with a problem, they should consider the question under the principle "Do unto others as you wish others to do unto you." That is a principle of Chinese philosophy too.

Mr. LEIFUR MAGNUSSON. Would it be out of order to call attention to the fact that many of our population frictions at the present time are due to circumstances which cannot be found in international law, of course? Many of these frictions and difficulties exist in the economic sphere. And when we have this blessed day of economic recovery, whether it is sixty days or sixty years around the corner, some of those frictions, of course, will have disappeared and a great many population problems will be solved.

Clearly the movement is not in the direction of liberalization of immigration controls; it is rather the other way. But may we not ask for more certainty in some controls?

In the actual regulation and control sphere the difficulty lies in the fact that the governments themselves have not been willing to accept their problems and their responsibilities explicitly. We are a country of immigration. We invite people here. We examine them carefully: medically, socially and morally. Over in Europe we sign on the dotted line. They are reinvestigated when they come over here and somebody signs on the dotted line, and presumably these people are here to stay. But, no, they are not. We have not accepted our responsibility. We say if they commit a crime or misdemeanor within so many years we will deport them. If it were an American

citizen we would put him in jail for his crime; he would pay his penalty and that would be the end of it.

We still have not accepted our responsibility fully and whole-heartedly, it seems to me, and made the admission once and for all; we have not really honored our signature. That is not a charge that applies only to the United States. One can cite the United States merely as an example. Every country utilizes this subhuman, antiquated, feudal or medieval process of deportation, and in that way is refusing to accept the responsibilities of sovereignty.

Chairman WILSON. Is there any further discussion of the subject of problems of populations and persons? If not, I would like to call Mr. Garner to the Chair to proceed with the second part of the program.

(Professor JAMES W. GARNER now presiding.)

Chairman GARNER. We have now arrived at the second part of the afternoon's program. The subject now open for consideration is entitled "Problems of markets and raw materials." Professor John B. Whitton, of Princeton University, will deliver the opening address.

Professor JOHN B. WHITTON. I must confess that I am rather terrified at the breadth of this tremendous question which I am supposed to cover in twenty minutes, especially since I am being forced against my will to venture into a new field. In fact, a disconcerting characteristic of international law is that its problems stretch forth into many fields, as for example history, politics and economics. When I was a student at the University of Paris, one of my friends, an Italian student, used to say that international law was largely poetry. And apparently the Italian Government considers it so today. In my paper I do not have to go quite so far afield, but as economics is by no means my forte, if I find myself mired in this rather unfamiliar ground, the fault must be ascribed, at least in part, to the program committee.

PROBLEMS OF MARKETS AND RAW MATERIALS

By JOHN B. WHITTON

Associate Professor of Political Science, Princeton University

Raw materials and markets constitute one of the great problems of international society. This is obvious. No one can deny that the search, by the States of the world, for adequate supplies of raw materials which they need or think they need, and their efforts to assure an outlet for the goods they feel they must sell, have been one of the foremost causes of international friction, colonial rivalry, aggressive imperialism, and even war itself. The possession of raw materials and markets ordinarily means wealth. The struggle for wealth, in a society constituted like ours, is as natural for nations as it is inevitable for individuals. In the one case as much as in the other, such search for wealth is marked by tremendous competition which is bound to

become ruthless when the following two factors are present: first, a scarcity of such riches; second, an absence of organized law.

Any gold rush on the frontier of civilization offers proof of this assertion. Continuous, acrimonious disputes over rival claims, frequent gun-battles, the rule of might over right,—in short, anarchy,—cannot cease until the miners accept, in self-defence, the rule of law and the sway of the court, and this ultimately and inevitably happens.

Now, our international society is in this primitive gold-rush stage. We have the rivalry for riches, and all the latest perfections for obtaining them, but we are still in the period prior to the acceptance of a civil code and a superior judge. As a result, what predominates in our present international society, lurking in the background of every disarmament conference, stalking the halls of Geneva and the anterooms of foreign offices, including our own, is that great fundamental and all-pervading problem of this and every other society—the problem of security. Before going further, let me insist upon the great weakness in the present plans for peaceful change,—their neglect of this vital problem of security. The neglect is unfortunate, and in fact may prove fatal. There is a real danger of subjecting the world to more disillusionment, and it is doubtful whether we can stand many more like those caused by the failure of the Pact of Paris.

We can begin by making certain statements which few will question. First, it is obvious that nature has made an inequitable distribution of its riches, particularly of raw materials; second, that this natural inequality has been considerably exacerbated by the various practices to which States have resorted in the course of modern economic nationalism.

First, a brief reference to the inequitable distribution of resources. In minerals, the North Atlantic Powers are predominant and, according to the experts, this condition is permanent. The United States, Great Britain and Russia are particularly favored, and in fact are the only countries which even approach self-sufficiency. The United States is the most fortunate of all, for that country, through its own production plus the control of certain foreign sources of supply, enjoys 40% of the world's mineral production, including 73% of the copper, 66% of the silver, and 70% of crude petroleum.[1] Great Britain possesses a virtual monopoly of tin and rubber. Germany and France possess most of the world's potash, Chile has within its borders almost all of the natural nitrates, Japan has most of the natural camphor. In this matter, dependencies are particularly favored—which is a most important consideration. Almost all crude rubber comes from colonies in Asia—57% from Brit-

[1] "The richest raw material regions of the world are in great part under the dominance of the Anglo-American Powers; and that these two national groups, which account for over 60% of the world's industrial output and exercise financial or sovereign control over 75% of the mineral resources, hold the balance of power in so far as the essential commodities of peace and war are concerned." (Emeny, The Strategy of Raw Materials, p. 174.)

ish Malaya and 30% from the Dutch East Indies. Practically all of the palm and palm kernel oil are produced in African or East Indian colonies, Asia gives us two-thirds of our tin, while the copper produced in the Belgian Congo and in Rhodesia is becoming more and more important, now accounting for nearly 20% of the total world production.

In a peaceful world, under suitable conditions of exchange, inequality in natural resources ought to cause little trouble. It is war—both economic war and political war—which makes the problem serious. With regard to economic strife, it is evident that economic nationalism is more intense today than at any time in history. The World War demonstrated the vital rôle played by raw materials and showed how they could be controlled to serve national interest. The two depressions which have followed the world conflict have induced nations to follow a policy of *sauve-qui-peut*, with, as a result, desperate attempts to achieve autarchy at the expense of one's neighbors.

Given the limits of the present paper, we can only refer briefly to these practices. In the first place must be put the ever-rising tariff walls, which Viner calls "the most severe and the most important interference with the law of supply and demand which the world has ever known." More immediately exasperating to other States, however, are certain monopoly practices. First, there is the attempt to raise prices by controlling production. The Stevenson Plan to raise the price of rubber caused in this country much bitter feeling against Great Britain. Japan's control of camphor, a government monopoly, and Chile's exorbitant export taxes on nitrate, were keenly resented abroad, although in both cases the exploitation of synthetic methods of manufacture, on a large scale, brought the original prices down to a reasonable level. Sometimes several nations, or their producers, through an international agreement, proceed to stabilize prices by restricting production, allotting markets, etc. An excellent example of this process is the Franco-German potash combine or the recent multilateral understandings as to tin and copper. Some States, through various controls, maintain a monopoly of the processing of certain of their own raw materials.[2]

Still more provocative to outside nations are discriminatory tactics. Let us mention in particular that some States have set up preferential duties. As examples, we may cite, with regard to their dependencies, the dominion preference duties in the British Commonwealth, and the policy of colonial assimilation in France and the United States.

In this realm of colonial administration, let us not forget the general policy of the "closed door." Most States tend to retain for their own nationals all sorts of privileges in their dependencies—concessions for exploiting raw materials and for constructing public works, a monopoly of investments, special shipping and transportation rates for nationals, etc. As a result, the

[2] For example, the smelting of ore, manufacture of wood-pulp, the refining of camphor —practices indulged in respectively by Great Britain, Canada and Japan.

home country may acquire a virtual monopoly of trade with a colony. At the end of the nineteenth century, Belgium, through closed door methods, had cornered over 90% of the trade with the Belgian Congo. No wonder rival States become exasperated; some maintain that it was the closed door tactics applied by rival Powers in their colonies which finally induced Bismarck to embark upon a policy of colonial expansion.

Now we have seen that in the possession of economic riches, grave inequalities exist. The causes are both natural and artificial. Nature has made an inequitable division of her riches; and man himself has intensified this inequality by employing a number of questionable practices. Is there no remedy for economic inequality? Many have been proposed. The path leading from Versailles down to the present, from the Fourteen Points to the speeches of Lansbury before the British Parliament, is paved with excellent plans and pious wishes. But, unfortunately, the louder have economists urged the nations toward free trade, the higher have governments built their tariff walls.

Recently, however, we have witnessed a revival of sentiment in favor of economic justice. The most encouraging thing about these proposals is that they come, not from professors, but from statesmen! In the spring of 1935, Mr. Lansbury, the British Labor Leader, called for a new international conference to reorganize the world so as to assure to all sufficient raw materials and adequate markets. In the fall of the same year, Sir Samuel Hoare, at Geneva, said that his government would join in an investigation of the problem of colonial raw materials, above all so as to assure to industrial countries those vital supplies which they require. Mr. Hull, our Secretary of State, is directing our economic foreign policy into liberal channels and seems to favor this new movement. Even Mr. Hitler suggests the calling of a conference to consider the economic needs of the nation.

A number of solutions for the problem of raw materials and markets have been proposed, particularly this past year. Let us examine these proposals briefly, and suggest what chances they have for adoption, or, if adopted, what they offer in the way of a helpful contribution to the cause of international peace.

1. Re-apportionment of colonies. Some have proposed that the so-called "haves" agree to divide their natural wealth with the "have-nots," this through a general re-apportionment of the colonies. It is extremely doubtful whether the nations would even agree to discuss such a plan. Last year when the British Government suggested, in the form of a trial balloon, that Britain cede to Italy a minute portion of the greatest empire in the world, the reaction among Englishmen was not very encouraging to say the least. And even if the nations accepted this plan, would it solve the problems at hand? How could the British colonies be re-apportioned so as to assure adequate supplies, say of rubber, to all the Powers? What redistribution of African colonies would give Italy the coal she lacks, or supply Germany's deficiencies in cot-

ton, wool, or oil? Those "have-nots" who nourish the illusion that through colonies they may approach self-sufficiency would do well to reflect upon this fact: even the most fortunate of the "haves" cannot achieve autarchy. Great Britain is especially vulnerable in the matter of foodstuffs. In war and peace the United States is dependent on foreign supplies of rubber, to give only one example, and in time of war would have to import at least 30 commodities which we produce in insufficient quantities or not at all.

2. CENTRAL CONTROL BOARD. Certain optimistic internationalists suggest that a central international board be created to apportion the supplies of raw materials to the consuming States. The main principle behind this plan would be "to each according to his need," instead of that which motivated the settlement at Versailles, "to him who hath shall be given." As a precedent for such a scheme, the Allied Shipping Control Board of war-time days is cited. Experience demonstrates, however, that international administration is workable only when devoted to relatively small and definite tasks, as in the case of the Danube Commission, or when carrying on merely ministerial duties, like the Postal Union, and then only if it works out to the interests of all concerned. A board set up to deal with such vital questions as essential raw materials could not live long, except if coöperation were required to meet a great common peril. Thus the Allied Maritime Transport Council was able to function during wartime, but the famous Sugar Union of 1902, while successful for a period, was killed by the mutual rivalries of the signatory States, just as soon as the immediate situation it was aimed to meet began to improve. The proposed plan for a Central Board smacks too much of the super-state to be accepted today, or, if accepted, to work for any period of time.

3. REVISED MANDATES SCHEME. Another plan centers about the mandates scheme. It is proposed—and Lloyd George himself is one of the proponents of this scheme—that all dependencies be put under the supervision of the Mandates Commission, which should be given considerably greater authority than it enjoys at present. It could enforce the "open door" in dependencies, as it has endeavored to do in the A and B mandates. This plan would probably prove inacceptable today. The Mandates Commission, being closely connected with the League of Nations, would hardly be *persona grata* to Germany, Japan or the United States. Italy, fresh from a conquest of Abyssinia effected only after enormous cost, would not be likely to accept any such controls.

4. FAIR PRACTICES SCHEME. Another plan, divorced from the League of Nations or from any super-state conception, calls for the acceptance by the States of the world of a code of fair practices in the field of international economics. In brief, it would involve the following points:

(1) *Commission of investigation.* A fact finding commission should be appointed to make a scientific study of the whole question of raw materials and markets. A number of assumptions which lie back of the claims of certain States to colonies and other economic privileges, have never been thor-

oughly investigated. Among the pertinent questions to be considered are the following: Do colonies pay? Do they furnish in raw materials enough to compensate for the cost of conquest, defense, administration? What is the real value of colonies as an outlet for surplus capital, or for excess population? Is there any logic in the stand of a "have-not" Power which at one and the same time demands colonies to take care of excess population, and gives prizes for abnormally large families? What advantage is enjoyed by nations, like England, who obtain rubber from their own colonies, as compared with that of Sweden and Switzerland, who purchase them from Britain? What advantage is possessed, too, by a country selling finished goods to its own dependencies over one selling them to someone else's dependencies? Is the claim a valid one that States like Italy and Germany are prevented from buying abroad necessary raw materials because they have not the necessary exchange, and that this is due to the high tariffs of other countries? And, finally, admitting that the acquisition of great empires like those of France and England might be of some assistance to the "have-nots," could they succeed in overcoming their present deficiencies by seizing the territory now available for colonization?

Personally, I am convinced that such an inquiry would reveal fatal fallacies in most of the arguments of the "have-nots." A vital fact which would be established is the following: if certain States do find difficulty, today, in supplying themselves with essential raw materials, it is not because such goods are not available. On the contrary, they can be purchased readily, and, since the depression, at unusually low prices. The main difficulty is to find the exchange to pay for them. And it is the high tariffs of foreign States which have much to do with this situation. Consequently, says Sir Norman Angell, "Once we recognize that the essence of the difficulties in the matter of raw materials or population is markets, and that better markets mean merely an increase in the exchange of *goods* or services to mutual advantage, certain clear lines of policy are indicated." Thus the international commission of inquiry should answer the following question: Now, granting that certain States are in an inferior economic position today, is it not possible that much of such inferiority would disappear, or at least be considerably attenuated, if a code of fair practices were adopted and put into effect? If the answer to this question be in the affirmative, then the commission could proceed to draw up such a code, and an international conference should be summoned in the effort to induce the States of the world to accept the code.

(2) *Code of fair practices.* Such a code might include rules along the following lines:

1. No State shall impose discriminatory export taxes, nor discriminatory import duties. Furthermore, a movement should be initiated to effect a gradual reduction of existing tariff walls.

2. No State shall grant to imports of raw materials coming from its own dependencies any privileged treatment of any kind, whether through prefer-

ential tariffs, special shipping or transportation charges, rebates, or otherwise.

3. No State, through the restriction or limitation of production or otherwise, shall maintain the price of raw materials at an unreasonably high level.

4. International combines established for the purpose of stabilizing prices or pooling markets should likewise be governed by a code of fair practices, to be defined in detail. Such combines should be carefully designed to satisfy the interest of the consumers as well as the producers.

5. When tariff agreements are being concluded between two or more States, interested third States should be given the right to be consulted.

6. Raw materials should be sold to all foreign nations, irrespective of nationality, on equal terms, except where the seller country is obliged, by treaty, to apply economic sanctions against a State declared to be an aggressor in violation of international covenants to keep the peace.[3]

7. Every State shall follow scrupulously, in relation to its colonies or dependencies, the policy of the "open door." A foremost object of such a policy is to assure to all outside States an equal right of access to raw materials. In the code of fair practices, the "open door" policy will be defined in detail, using as model the Congo Convention of 1885, the Mandates of the League of Nations, and the Washington Treaties defining the "open door" in China, and any other pertinent treaty. Such rules would deal with investments, concessions, public works, tariffs, transportation charges, post tolls, shipping rates, etc.

In connection with the above plan, it might be indispensable to conclude an international accord for the stabilization of currencies.

No one could claim for this scheme that it would solve all our economic ills. But it should mean an important and significant step toward healthier international relations, attenuate the existing economic nationalism, and, in the long run, eliminate many jealousies and abolish much friction which constitute a grave menace to peace.

(3) *Obligatory arbitration.* Such a system, however, would be worse than nothing unless some means be provided for interpreting and applying the proposed code of fair practice. This has been proved by experience. The "open door" provisions of the Congo Convention were almost perfect from the legal point of view, but were rendered illusory and became a total failure because of *ex parte* interpretations. On the other hand, all that has kept intact the "open door" arrangements in the mandates is the constant and vigilant action by the Mandates Commission, first of all because of its weapon of publicity and investigation. Consequently it is absolutely indispensable that all nations signing the proposed convention on fair practices should bind

[3] The following proposal made by Sir Arthur Salter might well be adopted: "No prohibition or differentiation shall at any time, peace or war, be imposed on the export of raw materials from any colony to any place except by international action for the enforcement of international covenants when applied, such action to apply equally to all protectorates, colonies and mandated colonies without any distinction between those which are and which are not controlled by a State against whom the international action is taken."

themselves to submit to arbitration any dispute arising out of the interpretation or application of the code.

CONCLUSIONS

As I have already suggested, what makes these inequalities between nations serious is the prevalence of economic and political warfare. The latter is particularly serious. In the present atmosphere it would be almost impossible to induce the nations to accept a code of fair practices. And, if accepted, it is unlikely that such a code would bring peace so long as there still remains the fear of aggression. There is nothing to prove that the so-called dynamic nations, the "have-nots" or others, would abandon their dangerous designs even if their economic needs were fully satisfied. And so long as such designs persist, other nations will not be relieved of their fears—fear of being cut off from foodstuffs in war, fear of insufficient raw materials in time of war, and, worst of all, fear of attack. In short, solve the problem of raw materials and you will *not* solve the problem of war. Rather, solve the problem of war, and you will then be in a position to solve the problem of raw materials. Rid the world of the psychological causes of economic nationalism, and much of the problem will solve itself.

Thus, with respect to the whole problem of peaceful change, I cannot avoid the conviction that security must come first. I admit that this may mean, temporarily, the crystallization of the *status quo*, but there is no other solution. Rid the world of the menace of war, and a period of tranquillity will follow, in the atmosphere of which it may be possible to overcome many of the present injustices with which we are afflicted. But it seems rather futile to expect the States to coöperate today in effectuating peaceful changes —whether through revision of treaties, rectification of frontiers, or even the acceptance of a code of fair practices in the field of international economics —in an atmosphere poisoned by frenzied armament races, mutual recriminations, vague threats for the future, and the violation of solemn covenants.

Unfortunately, in Europe today, the chances of solving the problem of security seem to be very remote. This is only too evident, and we all deplore it. On the American continent, however, we are more fortunate. Here we do enjoy a very large measure of security. Furthermore, we have today an unexampled prevalence of mutual good will. In fact, never before in our history have we enjoyed such excellent relations with the other American States. Why not seize this unprecedented opportunity and make our continent, in economic as well as political matters, a region of peace? At the coming Pan American Conference, then, the American Government, under the leadership of one of the most progressive Secretaries of State we have ever had—one who has already accomplished so much in the field of international trade—might well take the lead in proposing for our American nations a code of economic fair practices which would constitute for the world as a whole a notable precedent, and might even point the way to a real and a lasting peace.

Chairman GARNER. The discussion will now be continued under the ten minute rule by Mr. Wallace McClure, of the Treaty Division, Department of State.

Mr. WALLACE MCCLURE. The problem of raw materials and markets would seem to be a problem of purchasing power. To the extent that this conclusion follows from his sound and interesting presentation, I agree thoroughly and fully with the speaker who has introduced this subject. My younger colleague from the Department of State, however, has suggested that there is or ought to be a general rule, in regard to the discussions, that we shall "tear into" the previous speaker. He himself did not find ground upon which to follow the rule. But we have an *esprit de corps* in the Department which urges us to complement one another's efforts. With that in view I think I shall inaugurate this part of the ceremony by tearing into at least one item in the speech of the previous speaker.

Perhaps it would be difficult for one who loves to commune with nature —and I dare say all of us international lawyers are particularly included in that category—to come from the outside on so delightful a day as this, into even so handsome a room as that in which we are gathered, and there hear nature maligned, without desiring at once to come to her defense. I feel that nature has been maligned in this meeting—and that by our very good friend, the previous speaker—because I do not believe nature is guilty of having made an inequitable distribution of raw materials. I cannot help thinking of the house we are in or any other house. The good architect of the house provides for the various parts. He puts the coal bin, for instance, down in the basement and he puts the various other features of the house in the proper places as it rises towards the roof. I do not think the architect should be seriously impugned because he fails to put a coal bin in every room or on every floor. I think the architect naturally expected that the occupants of the house would all use the coal bin down in the cellar, where coal bins belong.

Similarly I believe that nature, the great architect of the house that we, the human family, inhabit, expected that, with several coal bins scattered through several cellars in the rather extensive mansion, all of us would be able to get along very well and we would not need to have the coal scattered about so as to be found within every area that might be artificially delimited from year to year for purposes largely of politics.

Therefore, I believe the first duty which faced me was to come to the defense of nature in this matter. But all of you see at once that, in so criticizing his remark, I am not really doing otherwise than agreeing with the thesis of Dr. Whitton. His problem as he sees it is one for solution through liberal international collaboration. I feel sure most of us agree with him in this analysis. So while I should like to have disagreed, I really am making only points of agreement with his address. Any exception I might take would deal with detail and not with general substance.

As I said, the problem of raw materials would seem to be a problem of

purchasing power. This leads us to a discussion of the distribution of wealth.

The economic problem of the distribution of wealth is becoming so much of a factor in our law-making that I believe we should address ourselves, when speaking briefly, to the general problem, rather than to any specific part of it, if we are to build up a solution to this particular problem of raw materials and markets. We see throughout the world in all countries a mal-distribution of wealth that affects the individual human being and we see efforts everywhere to eliminate the worst phases of that particular evil. Then we see within countries various economic classes who consider themselves to be underprivileged.

"Underprivileged" is a word which comes to us immediately when we think of the raw materials problem. We think naturally of some great country that is crowded, that is industrialized in the manufacturing sense and that is looking for markets, and one that does not have a large supply of raw materials. That is the picture that comes to us. A similar picture comes with respect to individual human beings if we analyze the matter down far enough. And it comes with respect to parts of countries.

Take our own situation here in this country with our southern cotton problem and with our farm problem generally. Great sections assume the attitude of being underprivileged. The correctness of that attitude is generally recognized and a large portion of recent American national policy has been formulated with the purpose of remedying this situation. If such situations prevail among individuals and among economic classes and sections within organized States, is there any reason to suppose that there will be no instances of underprivilege among national States themselves, that there will not be some States wherein there appears to be a general condition where a man's labor and efforts to enrich himself will not bring to him the satisfaction that they will bring to men in other States of the world?

So far and so long as that is true we are going to have an international problem of purchasing power, and we are going to have a problem wherein those who are not able to make their labor count as much as others in purchasing power are going to be very sure, even if in part for reasons which others consider imaginary, that they are not getting their share of the good things of life. And consequently there will be the problem of not only raw materials but of other forms of wealth.

So it seems to me—and I think in so saying I concur in what Dr. Whitton has said—that it is through this general approach that we must arrive at practical solutions. We can make progress by changes in our national legislation and customs, by trying to rectify the evils existing between classes in our own country and trying to develop international legislation so that there will be fewer individuals and fewer groups, whether sectional or national, where there is justification for an underprivilege attitude. There is need to go to the root of the matter all along the line, employing measures that will not be painless. The problem of eradicating discontent on the subject of

raw materials is integrated with the other great problems of economics and politics we have to solve and, of course, forms an essential element of them.

I do not believe the solution of the problem of war would of itself solve this problem. It would undoubtedly assist in such solution because it would moderate anxiety about supplies and would remove a very acute form of interference with international economic life. But even if there were to be no more war, as long as there remained this problem of unjust and widely varying distribution of wealth, which includes the problem of purchasing power, and as long as excessive trade barriers were permitted at international frontiers, in my opinion there would still be a serious problem of raw materials.

So we must try to accomplish our end through all manner of treaties and international action and development of international law, and we must not expect the solution to come from any one of these things, but rather through the general betterment of the political and economic affairs of the entire world.

Chairman GARNER. The discussion will be continued by Mr. Brooks Emeny, Educational Director, Foreign Affairs Council, Cleveland, Ohio.

Mr. BROOKS EMENY. I have two charts illustrating the raw materials position of the great Powers, the seven industrial Powers. I believe they illustrate rather graphically the actual raw materials situation of the Powers. Of that aspect of the problem there can be little discussion. We can reduce it to fairly accurate statistics, both in terms of self-sufficiency, that is, ability to produce different raw materials, and also in terms of relative industrial capacity which, in a sense, is even more important.

After all, the problem of raw materials as it is raised today might be relatively simple were it not for the fact that Germany, although the poorest of States in raw materials of the great Powers in Europe except for Italy, at the same time is the greatest industrial Power of Europe. Therefore Germany is in a position, provided it can keep its industrial plant going, to wield potentially the greatest military Power.

I am afraid I can only add further confusion to this problem of raw materials, because it would appear that we are in the early days of discussing an almost limitless number of factors that seem to be involved. The problem was only slightly conceived of before the World War. We know that Germany did stock-pile certain materials which she lacked, which stocks gave out after about six months of war. And then you had the settling down to gradual starvation in which the Germans tried to starve the British and the British tried to starve the Germans. The war, of course, taught the Powers that the control of raw materials was no easy matter when it came to warfare. Yet that knowledge maintained in the consciousness of certain military and industrial leaders, did not become a factor that was known and understood by masses of people.

One of the curious aspects of the problem, therefore, is the fact that those nations which for their own peculiar reasons have attempted to utilize the unequalled distribution of raw materials as a weapon of power, as a weapon for maintaining, as they said, the collective system, thereby actually served to aggravate further the situation.

It may be perfectly true that if, with the speed of the declaration of war and mobilization of armies, a complete boycott had been imposed upon Japan, or upon Italy, or had been imposed upon Germany, that the wielding of that weapon, as cynical as it may have been, might have been effective for the particular crisis concerned. But instead there has been half-hearted attempt to cause a little bit of the pinch but not a pinch the whole way. Even in the case of Japan nothing was done except in terms of notes proposing. But the results of these half-hearted acts have been tremendous. If the United States in the time of the Manchurian crisis had sat down and tried to think out what would be the best possible way of encouraging the Japanese to continue in the policy which they had inaugurated, they could have done nothing better than what they did do, because instantly the Japanese people as a unit came to the support of the military. The Japanese people for the first time came to appreciate the importance of raw materials to their national security, and the expansion on the Asiatic continent in their eyes, at least, became fully justified. They are going to be disappointed in many ways, because Manchuria and North China do not contain these mines of materials which would ordinarily be necessary to the national defense of Japan.

The same, of course, has happened in the case of Italy. Sanctions have had a more devastating effect in the case of the Italians. They have really aided Mussolini more than they have inhibited his actions, because the policy has served to consolidate Italian opinion back of him more than otherwise would have been possible, and has also made the Italian people realize that it is a grave question of national security that involves somehow the gaining of possession of some of the essential raw materials.

It may be that the immediate problem, so far as national defense is concerned, will work itself out, despite attempts to set up ideal commissions of investigation; that is, it may be that stock-piling on a very grand scale may be resorted to. In fact, the process is already going on. What has made the position of Germany so very difficult is that Germany has not been able to buy sufficient materials with which effectively to stock-pile. We know that the problem of manganese for France is a very serious one because there is no manganese in France. But, as a matter of fact, France has stock-piled in manganese sufficient to maintain any probable war effort which she would have to attempt.

We know that through the ingenuity of chemists and engineers many raw materials are being produced. Camphor is no longer a dangerous monopoly. All of the Powers now are capable of being self-sufficient in nitrates,

and artificial rubber has become very well advanced. There are substitutes now for cotton and even for wool. Only in some of the important metals is there really a serious problem, granted the nation concerned possesses sufficient fuel, coal, and oil, or at least coal, to carry on.

So the point I want to emphasize is that I do not think this question of raw materials can be reduced to any simple formula. We have only begun to bring to the surface vast ramifications of the problem itself. We know in the case of our own neutrality policy, in which again the problem of raw materials arose, we considered it to be a very simple matter of passing a law: but we had no sooner started on the debate of that policy than there were innumerable contingencies which arose, bringing the problem to the fore in American opinion. America realized that before neutrality could be solved as a problem, this whole question of our relationship with the rest of the world had to be reëxamined.

I might just note that it may also be that we are mistaken in trying to reduce this question to a world question. It may very well be that the problem of self-sufficiency in Europe will have to be worked out by Europe itself. Certainly the giving over of colonies to either Germany or Italy is going to serve no good purpose unless Germany or Italy can maintain a navy greater than that of Great Britain. If you sink the British Navy the problems of raw materials in the world in time of war will be, by and large, solved. But I do not think you are going to sink the British Navy. And yet the British Navy in Europe is one of the factors which renders the region of Europe a region of every peculiar conditions. Therefore, in my opinion there are certain definite limits as to how far this country can go in solving the European problem. Our influence must, it seems to me, be more indirect than direct. Particularly as a people we must come to realize that because of our tremendous size and economic power we may and have set in motion, through supposedly innocent domestic policies, forces which aggravate enormously the economic situations of other States.

The inability of Germany today to purchase raw materials, and likewise the inability of Italy, is due in considerable part, if you trace it back to its origin, to, let us say, the tariff as well as certain financial policies of this country, and possibly even to immigration laws. This is not such a complicated matter when we are dealing with a small State. It would not make much difference to the world if Mexico passed a silver purchase law, or if Mexico passed a Hawley-Smoot tariff, or if Mexico had adopted a policy similar to the United States in the matter of debts. But when a country the size of the United States does such a thing it affects the economics of the whole world. So indirectly in that way we may aggravate enormously the problem of the security of States in parts of the world in which we believe we have no direct interest or concern. I merely throw that out as another confusion to possibly muddy the approach to the problem itself.

Secretary FINCH. Before we begin the discussion of these very interesting papers, I would like to make a statement of a kind that I have never made before in the Society, not relating to the program, but which I feel I ought to make at this time.

We have been impressed by the number of members of the younger generation who have been attending these meetings; and I wish to inform them that the Society is not a closed corporation, that we welcome the addition of new blood to our membership, and that any person of good moral character interested in our objects is eligible for membership. We would be glad to have those who are of the younger generation, or of the older generation, give their names to the clerk in charge at the desk, and we will send them the appropriate literature telling them how they can become one of us.

The objects of the Society are printed on the program: "The object of the Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice."

Members of the Society receive for their membership fee of five dollars, four quarterly issues of the *American Journal of International Law*, which contains material entirely separate and distinct from what you are hearing at these meetings. In addition, the members have available to them the volume of the proceedings reproducing every paper you have heard at the meetings and also all of the discussions upon them.

So I would like to extend to those who are not members of the Society a cordial invitation to become one of us and help carry on this Society for another thirty years. We are now celebrating our thirtieth birthday. Many of us will not be present at the celebration of our sixtieth anniversary thirty years hence, and so we ask those of you who wish to join the Society to give your names to the clerk at the desk.

Chairman GARNER. We now have approximately a half-hour in which to continue this most interesting discussion. The Chair will now be glad to recognize anyone who wishes to speak from the floor under the five-minute rule, which will be rather strictly enforced.

Mr. FRANCIS DEÁK. I had hoped very much, Mr. Chairman, for a great deal of enlightenment today on the questions of raw materials, population pressure and markets. I come before you to confess that I am more confused than I ever was before.

I was wondering whether we have to abolish war first and then settle the economic problems involved, or whether we can settle the economic problems first and then eliminate war. I was trying to figure out which one is the horse and which is the cart and find out which speaker was trying to get the cart before the horse. My conclusion is that we do not seem to know which one is the horse and which one is the cart. And that is the trouble.

I would like to revert to what I took the liberty of suggesting here this morning. We are trying to reduce these problems to terms that are too simple.

The last speaker, Mr. Emeny, made a suggestion which I would like to challenge. He said the sanctions, or so-called sanctions, which were imposed upon Japan and Italy—the two countries designated as aggressors—had the opposite effect. He said this was so chiefly because the sanctions were applied half-heartedly. I do not know about Japan because I have not been there. But I happened to be in Italy during the last year throughout the month of August, and I had the opportunity to go around in the country and see various people, including government officials, and I do not think that the type of sanctions imposed had the effect of making the Italian people conscious of the lack of raw materials. As a matter of fact, lack of raw materials is one of the questions which has been discussed in every Italian newspaper and legal, economic and sociological periodical for the last twenty-five years. If there was any nation in the world which was conscious of the lack of raw materials and population pressure it was the Italian nation during the past twenty-five years. Mussolini has done nothing else but preach to the people through the newspapers, over the radio and by every means available to him that "We need to expand because we have no raw materials." No, Mr. Chairman, the sanctions did not consolidate Italy behind Il Duce's aggressive and imperialistic policy in Abyssinia. The reason why the Italian population was willing to show a united front and to support war with Abyssinia, was a question of prestige. If that unity was strengthened, it was not because the imposition of sanctions made the Italians more "raw-material-conscious," but because they resented the coercion exercised by other nations.

Mr. EMENY. Mr. Deák seemed surprised at the point I was trying to make, that the use of sanctions as such served to consolidate Italy.

Mr. DEÁK. No; I am only saying that I do not think that the application of sanctions consolidated Italy because it made the Italian people conscious of the necessity of having raw materials for the guaranty of what is believed to be national security. This consolidation was due primarily to the sense of injury of the Italian nation against Great Britain for attempting to impair that prestige.

Chairman GARNER. I happened to be in Italy last fall, and I remember the American Ambassador there told me that the attempt to strangle Italy by means of economic sanctions more than anything else solidified Italian public opinion and brought to the support of Il Duce almost the entire population of that country.

Mr. CHARLES WARREN. Mr. Chairman, is there any objection to that? Are not the people of every country behind their government in the time of war?

Chairman GARNER. Absolutely, surely.

Mr. WARREN. Are they any more solidly behind their government because other nations are against them in addition to the particular enemy? It does not seem to me there is anything in that argument at all.

Now that I am on my feet, I noticed a remark made by Mr. Emeny that

if the British fleet were sunk, the problem of raw materials could be solved. I think that was the statement, was it not?

Mr. EMENY. I said in Europe.

Mr. WARREN. If that were so, Mr. Chairman, I would say the existence of the British fleet was an unmitigated disaster to the world.

Mr. EMENY. I agree. But I did not for a minute suggest that that is so, because if it were not the British fleet, it would be some other fleet.

Professor QUINCY WRIGHT. I want to make an observation about the British fleet. Mr. Emeny's statement struck me as it did Mr. Warren. It seems to me that during the nineteenth century the British fleet was far greater in relative superiority than it has been in the post-war period, and yet then there was no problem of raw materials. I would say that the reason was that the economic center of the world was London. Finance was controlled from there, and the British fleet gave Great Britain this power of centralized control which was used in general for the purpose of maintaining a moderate freedom of trade throughout the world. Thus I think it might be argued the dominant position of the British fleet through the nineteenth century eliminated the problem of raw materials by maintaining a moderate freedom of trade under that aegis. I think perhaps this would give us some light on the problem of the cart and the horse which Mr. Deák raised.

If you are going to have a peaceful world, you cannot have every nation striving primarily to make itself the greatest Power in the world. I do not know how you can have two or three or fifty greatest Powers in the world. If every nation has that prime object, it is obvious that there will be no peace. If that is what every State is striving for, not only prestige but the most prestige, you might as well quit so far as either peace or justice is concerned.

I think to a considerable extent that is the state of affairs. There are a number of States that are impressed by the thought that it is possible for them to become the greatest Power in the world. Mussolini thinks he can reëstablish Rome, Hitler thinks he can establish a new Holy Roman Empire, General Tanaka expressed unbounded ambitions for Japan and so on. If we are going to have peace and order in this world, we will have to have law and sanctions so that States will devote their efforts to the common welfare rather than to becoming the greatest State in the world.

I think that was more nearly the situation the world was in during the nineteenth century. Under the happy aegis of the British position it was impossible for any other State to become the greatest State because, under the conditions prevailing, no one could build a navy to challenge the British navy. Therefore, most of them did devote themselves to the problems of peace and welfare, and during the nineteenth century we had probably the greatest expansion of welfare and one of the longest periods of peace in world history.

But I think that time is passed. I do not believe the British navy or any other navy can again maintain that condition which we had during the

nineteenth century. I do not see any way in which that situation of each State's wanting to become the greatest can be prevented except through a system of collective security. It may be that by action of all the nations we can again make it impossible for these false ambitions to be inspired in the minds of statesmen. Unless we can do it that way I think we have nothing to look forward to except to the absence of both peace and justice in the world.

Mr. EMENY. I do not think it is a question of fifty becoming the greatest Powers in the world because nature has already established that there can be only seven greatest Powers. Nature has also decreed that there shall be a vast difference in their potential capacities to industrialize. The point about the British Navy in that connection was that Great Britain was able to wield that power because she was the industrial center of the world. Today, so far as Europe is concerned, the Continent, and particularly Germany, is the great industrial center.

I did not mean to infer that I wanted to sink the British fleet. I simply said that, as I saw it, during the World War, the British by virtue of their fleet were able gradually to starve Germany industrially, and that was one of the principal reasons for the defeat of Germany.

Professor QUINCY WRIGHT. In answering that, may I say that I do not think Mr. Emeny adequately realizes the extent to which ambition may fly. I can see no reason why Denmark, which is perhaps a territory not well provided for, might not have the ambition to expand territorially until she could corner all of the raw materials in the world. It is possible that she could clip off a little piece here or there until within two or three centuries she would be the greatest State in the world as Rome from a village on seven hills did 2000 years ago. In that sense it is possible for every one of the fifty different States to have that ambition and for one of them eventually at the expense of the others to acquire sufficient territory and raw materials to become the greatest.

Mr. EMENY. Then you must move your coal bins. Wherever the coal bins are you will find the center of power.

Professor KENNETH COLEGROVE. I am inclined to believe Mr. Emeny is right with reference to nature's limiting the number of great Powers in the world to somewhere around seven. It is impossible for Denmark soon to become a great empire in the sense that Japan and Great Britain are great empires. The Danish population is so small that there is not much chance of its increasing to the size of that of the English or Japanese or Chinese, at least not within the space of several generations.

Now in regard to twentieth century imperialism, undoubtedly the insatiable yearning for national prestige is a powerful cause of the movement for the present imperialistic expansion of Japan and Italy. At the same time, imperialists seek to win popular support by the economic argument that expanding the boundary lines will give the mother country controlled sources

of raw materials and markets for manufactured products as well as an outlet for excess population. But imperialism in the twentieth century is a dangerous game. Japan is beginning to realize some of the dangers. The Japanese-Manchoukuo bloc has now developed into a Japanese-Manchoukuo-Mongolian-North China bloc. Throwing the boundaries of Japan so far over the mainland of Asia is giving rise to some difficult questions for Japan itself. The problem was foreseen some years ago by the great Chinese statesman, Sun Yat-sen, who prophesied that Japan would attempt to extend her jurisdiction over the continent of Asia, that after conquering Manchuria and North China she would expend a vast outlay of capital in developing the industries in China, that the Chinese would always out-number the Japanese in Manchuria and North China, and that, after China was organized industrially and perhaps politically, the Chinese by force of numbers would win their independence and keep all of the industries which Japan had built up on the Asiatic mainland. And thus Japan would lose a great capital investment.

More than this, even today Japan is embarrassed by her political expansion. It was thought that extending the boundary lines would provide an outlet for the overgrowing population of Nippon. But instead of the Japanese migrating to Korea or to Manchoukuo, Japan is now faced with the problem of Koreans, and even Chinese, coming into the Japanese Islands. The standard of living in Japan is higher than in Korea or in Manchuria. Wages are higher. And thus, the cheap labor in Korea comes to Japan seeking the better wages. So the population problem in Japan itself has been aggravated by the very fact of the extension of her boundary lines.

Mr. THEODORE MARBURG. Complaint has been made that the discussion is simply confusing our minds. It seems to me the problem is a simple one. The origin of all our economic troubles today, it is generally admitted, is the World War. It was the World War which caused the nations, particularly of central Europe, to build up their tariff walls so that if another war should come they would be self-sufficient. It is the World War which caused general economic prostration and higher tariff walls, and, as Mr. McClure pointed out, because of this policy there is little trade between the nations.

The matter of economic sanctions is a very delicate one. We tried the embargo under Jefferson. It proved a two-edged sword, and the people soon put a stop to it. And there is one feature of economic sanctions that has not been brought out, and that is its unequal operation. You apply economic sanctions to Great Britain, which has a seven-weeks' food supply, and at the end of that time she is on her knees. Apply the same sanctions for a similar offense to this country and it would not affect us. We have a great surplus of foodstuffs which we can get rid of only by exportation.

The program of the old League to Enforce Peace is what the world is gradually moving up to. It was this: if a nation went to war without previous resort to inquiry, conciliation or judicial settlement, the members of

the League were to use economic and military force—not economic *or* military force, but economic *and* military force forthwith against the offending nation. And, gentlemen, it is only the certain knowledge beforehand that such overwhelming military force will be used against the offender and punishment meted out that is going to stop war.

In time of peace any man who has the money to buy raw materials may do so. In time of war it is no advantage to a country to have colonies that produce raw materials, for it has been pointed out that the nation that is supreme at sea will control that situation. No matter what the richness of her colonies, unless her fleet is equal to or superior to that of the enemy, the raw materials in those colonies are absolutely useless to her. So it resolves itself back again to the question of war. The world must prevent war, and it has to be done by punishment, forthwith and immediate, of the aggressor.

Professor W. C. JOHNSTONE. I have listened to discussions similar to this, and it seems to me there is a large body of opinion which would agree with Professor Wright that the only way to curb the ambitions and activities of the great Powers is through collective security. And in almost every discussion I have listened to we reached that point, but there we stopped.

I heard a very prominent Englishman discuss this problem the other day, and he reached the same conclusion. He said that in the present crisis there is nothing that anybody can do to solve it, nothing he thought anybody could do would prevent war, but that we should take a very long look towards the future, towards the time of that rather Utopian age when the United States would coöperate with the other Powers, and Japan and Germany, to achieve this thing called collective security.

I would like to have Mr. Wright, if he is willing, go further and suggest what specific steps, viewing the present situation and not historical steps, might be taken or that we might wish to take to achieve this thing we call collective security.

Professor QUINCY WRIGHT. I feel that would be rather a large undertaking under the five-minute rule. However, I would like to make one remark which would bear upon the statement that was made last evening by Mr. Colvin. I hope Mr. Colvin is here so that he can correct me if I am in error. I believe he said the present States exercising sanctions had sufficient power to make sanctions effective, but the trouble was they did not use this power effectively.

I would disagree with his implied definition of the word "power." It seems to me that any political force consists of two elements. One of them I would call morale and the other I would call material resources. These are the two sinews of any army. The trouble with collective sanctions is not that the members of the League of Nations operating against Italy do not have sufficient resources, but that they do not have sufficient collective morale, and for that reason the League does not have sufficient political power.

The first problem is to increase this morale. How are we going to in-

crease the morale of the countries of the world to act together in emergencies and create a dominant political power which the ambition of any particular State can not resist. It is a problem of propaganda technique, if you like; it is a problem of all the States realizing their common interest.

Reference was made last night to the fact that the United States did not need to join the League of Nations because the others had sufficient material resources themselves. But I think sometimes we fail to realize the tremendous influence upon the morale of the others which results from the fact that a great Power like the United States is staying outside. If we are going to build up the morale of the collective system, we must get all of the great Powers to give moral support to it. One or two or three outside will have a bad effect upon those Powers who are within. We must not think of the proposal in terms of material resources only. The first problem is to build up the moral solidarity of the family of nations so that all its members will be prepared to make sacrifices in order to make effective the law which they profess. I do not think it is impossible, but we have to look at it in terms of a moral and psychological problem rather than of a material and economic problem.

Mr. McClure. I should like to mitigate the conclusion that appears to have arisen in the mind of my friend, Dr. Deák, at least to the extent of explaining what I myself mean, whether or not I can hope to set forth something upon which all of us will agree. One thing which I intended to say, but which I did not reach in the course of my earlier remarks, was that in the Department of State, with the trade agreements program which we are carrying out with initial success, we believe that we are starting what may accurately be pronounced to be the activities of one of the wheel horses that will pull the world economic cart—doubtless in part a coal cart, and certainly one that is much weighted with raw materials—out of the present slough of despond.

In other words, I am not troubled about the question whether the cart is before the horse or the horse is before the cart, because it seems perfectly clear that, in adopting measures which tend to liberalize trade and open up the paths of commerce, we are harnessing a horse which is able to release the cart and pull it forward. So it seems to me appropriate to mention to this meeting some very practical steps that are being taken. Dr. Whitton certainly hinted at, perhaps emphasized sufficiently, the advantage of such liberalizing measures, even though they may not be as large in scope from the point of view of the imagination as we should like. Yet they may, as things work out, prove to be immensely powerful in the solution of this problem.

The Government of the United States has, since the passage of the Act of June 12, 1934, been engaged upon a program of reciprocally reducing trade barriers by means of international agreements, generalized by virtue not only of the most-favored-nation clause, but also under the provisions of the statute law itself. A dozen such agreements have been signed; others, some of which

are of great importance, are immediately in prospect. They represent an effort to augment purchasing power at home and abroad, to open up the channels of trade generally, and to establish more ample assurance to everyone of supplies of all kinds, raw materials and others, wherever and by whomsoever they may be extracted or produced.

Referring to some other things that have been said here today, I confess myself mystified as to how it is that a decree of nature has been promulgated to the effect that there should be just seven great Powers. I am in agreement, however, with the utterer of that phrase in his outline of some of the sins of which his country and my country have been guilty in other years. I should have been delighted had he mentioned the efforts that the United States is now making through the trade agreement program. I am sure he joins me in hoping that this work will give a real start and real emphasis to similar movements by many other countries. It may conceivably work out, within not too long a time, an adequate solution to this great problem of creating confidence that no one will be denied access to raw materials or be without ability to purchase them.

Mr. DEÁK. I just want to say to my friend McClure that my remark was addressed exclusively to the discussion. I am in agreement with him so far as the specific work of the State Department in connection with reciprocal trade agreements is concerned. There is some good being done. But here we do not get to the point of discussing just what we should do.

Mr. CHARLES WARREN. I have been waiting and listening all day for some word on the question of aircraft. I have not heard it referred to today, and I have not heard it referred to in the past at many of the meetings of this Society. You may talk about the British fleet, or you may talk about other fleets, but the great problem of the world in the future will not be fleets but will be the influence of aircraft. And the influence of aircraft on international law is now and will be increasingly complicated and must be taken into consideration in all of these discussions of war and the problems of international law as connected with war. Yet we blissfully go ahead as if aircraft were not in existence, as if we were back there in the nineteenth century dealing with armies and fleets and with the relation of armies and fleets to raw materials, etc.

In the last year I tried to point out in an article in *American Journal of International Law* that we are not up to date in these discussions at all; that if we are going to talk about war, about international law, or whatever it is, somebody ought to say something about the effect that aircraft is going to have on all of these problems.

I leave that as a suggestion for next year. But I would like to hear somebody say something about it to show that at least we are living in the year 1936 and not in the year 1836.

Chairman GARNER. It would not be a bad subject for our meeting next year.

Mr. CHARLES HENRY BUTLER. Talking about war in the air, twenty-nine years ago I sat as a technical delegate in the Second Peace Conference at The Hague, in very solemn conferences in which it was decided by individual delegations and then by the Peace Conference itself that there was so little likelihood of the airplane ever being perfected to such an extent as to become an implement of war that it was not worth while making any rules and regulations about it.

Chairman GARNER. That is an historical episode. We are catching up gradually.

Is there any further discussion? We have about reached the hour fixed for adjournment, but if there is any desire to continue the discussion I know of no reason why we should not proceed.

Secretary FINCH. If you will permit me to do so, I would like to touch upon an idea which has not been discussed but which has to do with the consolidation of public opinion, or the support within a particular country, of the influences which may contribute to the consolidation of such opinion.

It seems to me we have not given sufficient consideration to the question of the participation of the individuals within the countries concerned in the control of their government. The first article which appeared in the *American Journal of International Law* in 1907 was written by Mr. Elihu Root, Secretary of State when this Society was born thirty years ago. It was entitled "The need for popular understanding of International Law." Mr. Root's thesis was that owing to the extent of the control of foreign relations by the people within nations it was necessary that, if nations would have a rational foreign policy, the people who control that policy should know something about international rights and duties.

Professor Wright referred to the need of a morale in support of collective organization. The war from 1914 to 1918 was fought, we were told, to make the world safe for democracy, in consonance with the idea that the more democracies we had, the more the people participated in government, the better government we would have, the less chance there would be for intrigue, and the less likelihood there would be of imperialistic policies. We all know that since the war there has been a great retrograde movement away from democracy. I imagine the spread of liberal ideas of government during the nineteenth century may have contributed to the prevalence of peace to which Professor Wright referred during that period. I would like to raise the question as to how you can expect to have a public morale or a popular influence to support international policies when the people within a given country have no access to world opinion, but have their opinions formed for them from above. I believe if there could be such meetings as we are having here, in Italy, in Japan and in Germany, the international problems which have arisen with those nations would not be so acute.

The Italian people probably do not have access to reliable sources of information from the outside, and because of the nationalist propaganda to

which they are restricted, they support Il Duce. I am quite sure the same condition prevails in Japan. I was in Japan in 1929 when a liberal government was in power, and I cannot believe that what has gone on since in Manchuria and China has received the solid approval of the people of Japan. We know the same thing has happened in Germany, as witness the recent ballot there with only one choice to vote in favor of the government's policies, and if you forgot to mark it you took the consequences of your forgetfulness.

It seems to me we cannot dispose of these international problems without taking into consideration the form of government of the particular nations, especially the instrumentalities and methods by which their foreign policies are determined.

Professor COLEGROVE. The subject of aircraft mentioned by Mr. Warren undoubtedly is of importance. Today, air power is developing so rapidly that a book in this field is out of date even before it can be published. Nations can so quickly change their relative status with respect to defense and offense through the control of the air. At the end of the World War, Great Britain and France were supreme with reference to aircraft in Europe. In 1936, this supremacy is challenged by Italy and Soviet Russia, with Germany promising in a short time to have an air fleet as great as any two other Powers. And, of course, Japan has an aerial armament as powerful as that of the United States.

I desire to make another observation in reference to public morale and armaments. It has been said that it is possible to develop a peace morale. At the same time, it should be observed, certain interests have long since known how to develop a national sentiment in favor of large armaments and prestige. In Japan, today, we are seeing a significant experiment in national education. This is the campaign of propaganda conducted by the War Office, aided by Fascist societies, to create a public opinion in favor of huge armaments.

I have recently examined some of the speeches of General Araki and some of the so-called "army pamphlets" issued by the War Office in Tokyo. One pamphlet claims that the air forces of Soviet Russia and the United States are pointed against Japan. It insinuates that the Government of the United States has in mind an air attack upon Japan from two directions. First, the American navy will move across the Pacific to a position three hundred miles eastward of the Japanese islands, whereupon the American air transports will release a fleet of airplanes which will fly across the intervening ocean, well supplied with bombs and poisonous gas, which they will drop on Tokyo and Osaka and completely wipe out those populations. A second American air fleet will attack Japan by way of Alaska and the Aleutian Islands. Simultaneously a Soviet air force, flying from Vladivostok, only six hundred miles from Tokyo, will carry devastation on its wings. Many of the "army pamphlets," having propaganda of this sort, have been issued

to the number of 250,000 copies. They have had a wide circulation in Japan; they have been widely quoted in the newspapers, and, no doubt, have had great effect in winning approval for the huge military budgets which the Japanese Diet has voted in the past few years.

Professor QUINCY WRIGHT. May I make just one correction in what Mr. Finch did me the honor of quoting? As I understood it, Mr. Finch referred to the need of building up the morale of the country. My thought rather was the building up of the morale of the community of nations, which I regard as quite a different thing.

Mr. Colegrove has explained certain devices which have been used in Japan, but he might have enumerated various other countries in connection with the matter of building up a national morale opposed to the community of nations and opposed to collective security. That is not the kind of morale I am talking about. I am talking about the morale of the community of nations as a whole. I think we had a manifestation of that kind of morale in the League of Nations Assembly in Geneva last October. I read the debates when they were voting sanctions against Italy; and I find them a very remarkable manifestation of a community of nations morale. Fifty States, one after another, although emphasizing the economic burdens which the voting of those sanctions would mean to them, nevertheless voted them because they had subscribed to the collective system and meant to maintain it. Switzerland and France voted to cut off trade which would seriously injure the communities near the frontiers of Italy, and it has injured them. Yet they did it, and in spite of the fact that France, particularly, had certain political motives for not doing it.

I think we can easily minimize the extent to which there is a morale in the family of nations. I think that was the most remarkable manifestation and something without parallel in the history of the world that fifty nations should have gone ahead and done this, and not only have done it in Geneva, but their legislative authorities back home voted the necessary measures to cut off all of the imports from Italy, certain exports to Italy, and all loans to Italy. The League now has the legislative decrees of, I think, forty-four of these States which have not only voted sanctions, but put them into effect by domestic legislation. It may be that there was not quite enough morale to put the matter over. But I think we should realize that we have the roots of a general community of nations morale, and possibilities exist for the development of this morale, to such a point that no State can harbor ambitions of a type to wreck the world.

Secretary FINCH. I do not think we can have a collective morale of nations separate and distinct from the morale of the different nations which make up the collectivity. I was not present at Geneva when this exhibition of the collective morale referred to by Professor Wright was shown, but I was in Europe last summer, and, of course, could be in only one nation at a time. But I did travel around several countries in succession, and I have

some idea as to what Professor Wright referred to as the collective morale existing in Geneva. I was in Belgium, for instance, and they were all decidedly opposed to Italy. Why? The question was: If Italy is permitted to take Ethiopia, what will happen to Belgium, or her colonies? Over in Holland the same question was asked, If Italy gets away with this, what will happen to Holland or her colonies? In Switzerland the same thing was true. There the thought was, "If Italy gets away with this, what may happen to little Switzerland?" And all the small nations in Europe were solidly opposed to the Italian aggression because of the fear that one of them might be the next victim. I think that is the explanation of the collective morale in Geneva to which Professor Wright refers. It is made up of the individual morales of the respective countries in the collectivity.

Professor QUINCY WRIGHT. Let me call your attention to a quotation from Grotius, with which I know you are all familiar, explaining why we have international law. He uses the term "bulwark" (*munimenta*). "The law of Nations," he says, "is the bulwark of the tranquillity of each nation for the future." (Prolegomena, sec. 18.) It is to the interest of each to maintain the law and the community without which there can be no law. We will have neither a law nor a community of nations unless the nations are interested in it. They are interested in supporting the morale of the community as a whole because it is the bulwark of the security of each. That is what we mean by collective morale.

Chairman GARNER. Before we adjourn I want to call your attention to the program this evening. We have a very interesting subject on the agenda, namely, "Neutrality and problems of peaceful change." The discussion will begin at eight o'clock in this room.

The meeting is now adjourned.

(Thereupon at 4:50 p. m., the meeting adjourned.)

FOURTH SESSION

Friday, April 24, 1936, 8 o'clock p. m.

The meeting was called to order by Professor GEORGE GRAFTON WILSON, presiding.

Chairman WILSON. The meeting will please come to order.

This evening we are entering upon the discussion of "Neutrality and problems of peaceful change." The first speaker will be Professor Amry Vandenbosch, Professor of Political Science, University of Kentucky.

Professor VANDENBOSCH. I enter upon the reading of this paper with a great deal of trepidation. The history of the meetings of this Society indicate that neutrality is a very inflammatory subject, but, nevertheless, it has a fatal attraction for the members of the Society.

NEUTRALITY AND PROBLEMS OF PEACEFUL CHANGE

By AMRY VANDENBOSCH

Professor of Political Science, University of Kentucky

Defenders of the policy of traditional neutrality have emphasized the fact that international life is not static and that the status quo cannot be long maintained where there are situations which have become unbearable to a nation or group of nations. And since international society, so the argument runs, has not yet provided and probably never can provide, adequate methods of peaceful change, war is inevitable. Neutrality is therefore a great boon, for it restricts war as narrowly as possible. It permits this inevitable change to take place with the least amount of shock to the world as a whole. Any departure from traditional neutrality in the direction of sanctions or "partiality" must lead to perpetual chaos and universal war. Whatever the validity of this argument, it is important to note that the defenders of traditional neutrality emphasize the inevitability of change, and that this change, the world being what it is, will frequently come through force.

Proponents of a departure from traditional neutrality stress the view that the world has become closely integrated physically, economically, and juridically, and that wars under modern conditions cannot be localized. Hence any violation of a treaty, or any war or threat of war, is a matter of concern to all States, and therefore all members of the family of nations should take measures to maintain the sanctity of treaties, to prevent war, or, if it has already broken out, to stop it. The emphasis is placed upon the maintenance of peace, which, under present conditions, must generally mean the maintenance of the status quo. Thus we may say, if with some over-simplifica-

tion, that one group emphasizes change and readjustment, and the wisdom of retaining a place in international law for inevitable explosions, while the other group emphasizes peace, order and stability. Tonight we are asked to examine neutrality in relation not to change only, or to peace only, but in relation to peaceful change, or stated differently, to orderly progress.

Under the concepts and rules of international law prevailing before 1919 there were no juridical barriers to war. Whether or not a State went to war was legally not a matter of concern to third States or the family of nations. Third States could choose either to remain neutral or to enter the war as belligerents. As neutrals they were under obligation to treat both belligerent parties alike. Belligerents could draw upon neutral countries for war material in unlimited quantities. In addition, belligerents acquired new rights, such as visit and search, blockade, and the interception of contraband, for the purpose of cutting off trade between neutrals and the enemy. If the aggressor was a great sea Power it received encouragement from the fact that the rules permitted it to cut the enemy off from the neutral reservoir of military supplies, while it, itself, continued to draw heavily from this same source. And if neither of the belligerents was a sea Power, both could draw freely upon neutral sources of supplies, being limited only by their financial strength. If their financial strength was unequal, the amount of supplies each received naturally was unequal. The less industrialized the belligerents, the more dependent they were upon neutral sources of supply. The recent war between Bolivia and Paraguay, for example, was carried on almost exclusively with arms and munitions obtained from the neutral world. With the increased application of science to warfare and the mechanization of warfare, a constantly larger percentage of belligerent imports became susceptible of warlike use; hence the neutral territory from which these supplies were drawn became more and more a base of supplies, and, in a sense, of hostile operations. Without pursuing this subject further, we may conclude, I think, that if traditional neutrality did not offer positive encouragement to resort to war, it certainly presented no deterrents to conquest or forceful change.

In defense of traditional neutrality, it is sometimes asserted that if it did not of itself serve to encourage peaceful change, neutral governments could at least play a rôle in bringing wars to a speedier close and in inducing the belligerents to conclude fairer and therefore more enduring treaties. Such was the view of neutrality held by President Wilson in the early years of the World War. He hoped that the United States could remain neutral in order that it might be able "to speak the counsels of peace and accommodation, not as a partisan but as a friend." The President strove to maintain a position of friendly service that might enable him, "when the time came to be useful in the cause of peace." [1] His tender of good offices was rejected. As the war progressed there gradually developed in Wilson's mind

[1] See Baker, Life and Letters of Woodrow Wilson, Vol. V, Neutrality Years, pp. 1–18.

a vision of a new world order, but his efforts for the realization of this vision were made not as a mediating neutral but as a crusading belligerent. History records few cases of successful neutral mediation.

One of the primary causes of international instability today is to be found in the extreme economic nationalism with which the post-war world has been cursed. This economic nationalism has origins which are not all generally recognized. The World War gave a tremendous impetus to the development of economic nationalism in neutral countries. By such devices as the system of import and export prohibitions and licenses, bunker control and the requisitioning of neutral tonnage, not to mention the "blockade" measures, the belligerents were able to exercise an extensive control over the economic life of neutral countries. Belligerents were not always satisfied with the amount of control exercised during the war but threatened further control after the war. At the time of the controversy between Holland and Great Britain over the transit between Belgium and Germany across Dutch territory of military materials, Lord Robert Cecil warned the Dutch Minister that the economic position after the war would be very serious, that neutral countries would only be able to procure necessary raw materials by the good will of Great Britain and her allies, and that if the Dutch Government did not comply with their demands, or tried to evade them, Holland's position after the war might easily become serious.[2] If such threats could come from an idealist like Lord Robert, what was to be expected of men of lesser nobility? "The neutrals," summarizes Turlington in his study on neutrality of the World War period, "learned during the World War that the extent to which they could continue their normal economic life depended chiefly on the degree to which they were economically self-sufficient or to which they possessed resources useful to belligerents. They also learned, if they had not already known it, that when the vital interests of two belligerent groups are at stake, legal and moral arguments are available to both sides for ignoring the interests of those who do not choose to participate in the armed struggle."[3]

Since the World War, neutrality has developed in new directions. There is, for example, the trend reflected in the benevolent or malevolent neutrality, depending upon the point of view, of the sanctionist States in the Italo-Ethiopian War, which represents so great a departure from the principles of traditional neutrality that not every one regards it as a form of neutrality. Secondly, there is the collective neutrality of the Argentine Anti-War Pact, suggestively elaborated by Jessup.[4] A third trend is represented by the new American isolationist neutrality policy. Because of the limitations of

[2] Vandenbosch, Neutrality of the Netherlands during the World War, p. 24.

[3] Turlington, Edgar, Neutrality: Its History, Economics and Law, Vol. III. The World War Period.

[4] Neutrality: Its History, Economics and Law, Vol. IV. Today and Tomorrow, by Philip C. Jessup.

time I shall discuss primarily the possible effects of the new American neutrality legislation.

The movement for a more effective neutrality came largely from a desire to keep out of war, but it was also influenced by the fact that world economic integration, the new methods of warfare, and mass participation in war, were rapidly reducing the twin duties of traditional neutrality—abstinence and impartiality—to meaningless terms. But what will be the effect of the arms and munitions embargo provisions of the new American neutrality legislation? And what will be the effect if this type of legislation becomes universal? Already in the World War Secretary Lansing indicated what might be some of the results of an arms and munitions embargo. In a note to the Austria-Hungarian Government on August 12, 1915, he declared:

> The general adoption by the nations of the world of the theory that neutral Powers ought to prohibit the sale of arms and ammunition to belligerents would compel every nation to have in readiness at all times sufficient munitions of war to meet any emergency which might arise and to erect and maintain establishments for the manufacture of arms and ammunition sufficient to supply the needs of its military and naval forces throughout the progress of a war. Manifestly the application of this theory would result in every nation becoming an armed camp, ready to resist aggression and tempted to employ force in asserting its rights rather than appeal to reason and justice for the settlement of international disputes.[5]

Obviously a neutral arms embargo will operate most injuriously to the agrarian and semi-agrarian countries—just those countries which are already weak and least prepared to defend themselves against aggression. States in search of safeguards against the effects of arms embargoes may turn to policies of economic self-sufficiency and the making of alliances. And in order to be the better prepared for war economically, it would only be a step for such countries to divert trade to their allies in time of peace. The possible evils here sketched could be prevented only by some agreement for collective security or mutual assistance.[6] But this is, of course, just the type of undertaking which a State committed to a policy of neutrality can not enter.

There are other problems involved in an arms embargo policy, as the present American arms embargo illustrates. States planning aggression may import their military supplies from the United States in advance of a contemplated attack. If the purposes of the embargo are not to be defeated, the embargo should be applied the moment a country begins the importation of arms and ammunition in abnormal quantities or by other signs gives evidence of hostile design against another State. But this could not be done without passing some kind of judgment upon the good intentions of that country. And

[5] Foreign Relations, 1915, p. 796.

[6] See C. C. Hyde, "Arms Traffic from Standpoint of International Law," Proceedings of the Academy of Political Science, January, 1935.

that would hardly constitute a favorable prelude to the neutrality which would presumably follow the outbreak of war. Even under the present Act, difficulties of this nature exist. Probably because of the many juridical barriers which have been erected against war since 1919, the practice of waging undeclared wars has increased. Congress has rigorously withheld from the President the power of determining an aggressor, but it could not save him from the necessity of determining whether or not war exists. When the President issued the proclamation warning American travelers against using belligerent ships, he stated by way of explanation that "we are now compelled to recognize the simple and indisputable fact that Ethiopian and Italian armed forces are engaged in combat, thus creating a state of war within the meaning of the joint resolution." [7] Thus the President enjoys a considerable measure of discretion, after all, and within limits, even of discriminating between situations. For apparently a state of war does not now exist within the meaning of the resolution between Japan and China or Japan and Russia, but it does exist between Italy and Ethiopia. In order to be consistent and to deprive the President of all power of discretion and of discrimination, Congress may have to extend the embargo to all countries, both in times of peace and of war. But this would accentuate all the evil tendencies of the present embargo, such as the promotion of economic nationalism and the making of alliances.

Attention has already been drawn to the impetus which may be given to economic nationalism by the arms and ammunitions embargo. How much greater would not this impetus be if the embargo were extended to include essential war materials, such as oil, copper, trucks, tractors, scrap iron, and possibly cotton. While the United States is an unusually favored country in the amount and variety of its raw materials, it is nevertheless deficient in many strategic materials, as, for example, manganese, tin, nickel, chromium, rubber, and quinine. The mere possibility that the embargo list of the new United States Neutrality Act might be extended to include essential war materials produced reports that foreign governments were turning their attention to this problem. It was reported from Paris that France might encourage investments in the production of cotton in Brazil, in order thus to free itself from dependence upon American cotton. Great Britain, with great coal supplies but no indigenous oil resources, was reported as turning her attention to the need of giving her future men-of-war power to move should oil sanctions by any chance become operative against her. However exaggerated these reports may be, they serve to indicate how the extension of the embargo list to include raw materials would serve to encourage the "haves" jealously to guard their raw materials and the "have-nots" to arm to seize them or to develop substitutes. It is to be noted that the new American neutrality legislation came just at a time when there was develop-

[7] New York Times, Oct. 7, 1935.

ing in Europe a movement in favor of some form of voluntary redistribution of raw materials as a means of preventing war.

There is a provision in the new American neutrality legislation which, in an unexpected way, may drive the world back to mercantilism in its worst form. I refer to the provision prohibiting the flotation of general loans to belligerents. The American decision to sell to belligerents only for cash will encourage countries to treat their gold reserves as war chests, and may lead them to direct their monetary policy toward preventing the depletion and stimulating the increase of their gold supply. To be specific, it might cause France to depart from gold much sooner than she otherwise would, in order to prevent the drainage of her gold reserves. The cash provision of the new American neutrality legislation thus injects an upsetting factor in the already chaotic world monetary situation.[8]

But such is the dilemma of neutrality that the more it moves in the direction of rigid non-participation, the greater the impetus it gives to economic nationalism and imperialism. There remain a number of measures which can be taken before a more effective, as distinguished from a merely legal or technical, neutrality is attained. Drawing upon the experience of the small neutrals in the World War, I suggest the following: the prohibition of the transit across neutral territory of all war booty, requisitioned goods and military supplies, and the limitation of the transit of all other goods to peacetime quantities; the prohibition of the passage over neutral territory of belligerent aircraft, whether military or non-military; the prohibition of the belligerent use of radio stations on neutral territory; the assimilation of belligerent armed merchantmen to warships and the exclusion of both from neutral ports; the exclusion from neutral ports of the vessels of any belligerent whose vessels fly the neutral flag as a ruse against the enemy; and the exclusion from neutral ports of adjudicated prizes. I submit that all these measures are logical extensions of neutral duties, especially under the modern conception of neutrality, which stresses absence of participation, direct or indirect, rather than impartiality. A thoroughgoing neutrality ought not to permit neutral territory to be used to facilitate the perpetration of an act of war. And yet what would be the result of the adoption of these measures? They would constitute a serious handicap to belligerent States which have few harbors and no territory outside of the homeland, or find themselves in unfavorable geographic positions. These measures would therefore very probably intensify the territorial phobia with which the world is afflicted.

If such are some of the problems of neutrality in relation to peaceful change, how different is it with membership in the League of Nations or some other pact of collective security? Sir Alfred Zimmern, in a recent article, raises the question of what would have happened to Ethiopia if there

[8] This problem was apparently discussed at a recent meeting of the board of the Bank for International Settlements. See report in New York Times, April 7, 1936.

had been no League of Nations? To this very hypothetical question Sir Alfred answers as follows:

> When in 1898 an attempt was made by France to extend her power eastwards from her existing African possessions to the basin of the Upper Nile, it met with determined resistance of the British Government of the day. Lord Salisbury, indeed, as the records reveal, was always particularly concerned to safeguard British interests in that region. And he was equally concerned to keep the concert of the European Great Powers from what he would have considered an undue interference in a matter which concerned Great Britain and France alone. If the League had not come into existence we are perhaps justified in assuming that the pre-war British policy in that region would have been maintained. It would have been more difficult for British statesmanship to steer clear of outside interference; and there would have been less chance than there is today of arriving at a settlement taking genuine Italian needs and aspirations into account.

There is another aspect to this problem. It must be frankly admitted that a discontented State must bring matters to a crisis before it is likely to get a hearing for readjustment, whether under or outside of Article 19 of the Covenant. States under obligations to apply sanctions against an aggressor will be anxious to prevent the necessity for applying sanctions, and they will therefore do everything possible to induce peaceful settlement. In fact, this fear and reluctance to apply sanctions may make their statesmen too feverishly eager to arrive at any kind of settlement, even at the expense of the innocent party, as the ill-starred Hoare-Laval proposal illustrates. With States not under obligation to apply sanctions and committed to a policy of neutrality, the situation operates to produce opposite effects. As the situation becomes tense, these States will relax their efforts to prevent war or to press for a proper settlement, lest they become involved in such a way as to make it impossible for them to stay out of war, should it occur. In this connection it is interesting to note that the British Government, through its Foreign Secretary Sir Samuel Hoare, admitted the need for Italian expansion and the justice of some of the criticisms that have been made against the Abyssinian Government, yet Great Britain applied sanctions against Italy. The United States Government made no such admission with respect to Italian needs or criticisms of the Ethiopian Government; it nevertheless treated the invading and the invaded country alike.

We are all agreed, I think, that sanctions should be accompanied by adequate methods of peaceful change. That adequate methods have not yet been developed is equally clear. Whether peace can be maintained without proper machinery for peaceful change may be doubted. But certain it is that in the present interdependent world, war will rarely, if ever, bring justice or improved conditions, and may easily bring chaos and ruin to all the world. It is generally assumed that a redistribution of territories is a necessary condition of peace. Little is to be expected from this method of

pacification. It is not likely that the "haves" would peacefully release any of their territories or colonies, and it is certain that, even if it were done, it would not solve the problems of the "have-nots." Far more is to be expected from measures to lessen the importance of frontiers by removing the barriers to the free exchange of goods. But isolationist neutrality intensifies economic nationalism.

In the light of this analysis, what policy should the United States adopt? Should it return to a policy of traditional neutrality, or develop its present isolationist neutrality policy? Or should it turn to a policy of collective neutrality, or perhaps of collective security? Upon this question I wish, in conclusion, to make a few observations.

First: In the past neutrality represented a fairly definite status under international law, though it should be remembered that even under the old concepts and rules the relations between neutrals and belligerents were never reduced to law, for either party could escape from the existing legal status by the resort to war. The World War and events since then have increasingly shifted the problem of neutrality from the realm of law to that of policy.[9] One has only to read a small part of the overwhelming literature on neutrality which has appeared in recent years to be impressed with that fact. Jessup, in his recent book, states that "the United States is free to choose from a number of neutrality policies," [10] while Dulles and Armstrong, in their book, *Can We Be Neutral?* use the word "neutrality" not as connoting a status defined under international law but as "that policy which a country at peace adopts toward countries at war," [11] and they suggest the adoption of a multiple system of neutrality. Assuming that neutrality is still essential, the old rules which formerly governed the relations between neutrals and belligerents have been thrown into hopeless confusion. It is, therefore, no longer a matter of going back to some old certainty, but rather of moving forward to a new position more in conformity with present-day needs and aspirations.

Secondly, there is the anomaly of belligerent rights in a system of law. Every textbook on international law uses the term "neutral rights." What rights does the neutral acquire upon the outbreak of war which it did not have before? As a matter of fact, war brings to the neutral only additional duties and burdens. It is the belligerent who acquires new and extraordinary rights by the mere act of declaring war, such as the right of visit and search, the right to maintain blockade and to capture contraband. We must use as a norm not the extravagant belligerent pretensions of centuries ago but of the present day international law of peace. To allow the exercise of these extraordinary rights to States, other than those engaged in self-defense or in maintaining international order, is the very negation of law and places a premium upon resort to force. It is to set violence above law.

[9] Switzerland, for example, in spite of its neutralized status, is applying mild economic sanctionist measures against Italy.

[10] Neutrality: Today and Tomorrow, p. 210.

[11] Page 9.

Years ago Judge John Bassett Moore pointed out the necessity for an international organization which "would set law above violence; (1) By providing suitable and efficacious means and agencies for the enforcement of law; and (2) by making the use of force illegal, except (a) in support of a duly ascertained legal right, of (b) in self-defense." [12]

Thirdly, while it is true that revision and sanctions should be linked like Siamese twins, it is also true that those countries committed to sanctions will be more disposed to help bring about peaceful change than States committed to a policy of isolation and neutrality. Our international troubles are in large part due to the anarchic condition of world society. Neutrality essentially promotes rather than reduces that anarchy. "They isolate themselves, expecting war," wrote Bastiat, "but isolation is itself the commencement of war." [13]

Lastly, all war today is essentially "civil war." "That war [and neutrality] should have any meaning at all, it is essential that the State should be coextensive with community, that a people should be as independent of any other people as a State is of any other State." "Today it is States and not communities that go to war, for there is no community which is separate and independent." [14] Under these conditions, peace and change are not opposite, but the same. John Stuart Mill, in his essay on representative government, pointed out the fallacy of setting over against each other Order and Permanence, Progress and Change. Order he defined as "the preservation of all kinds and amounts of good which already exist, and Progress as consisting in the increase of them." "We cannot say," he continued, "that in constituting a polity, certain provisions ought to be made for Order and certain others for Progress, since the conditions of Order, in the sense now indicated, and those of Progress, are not opposite, but the same. The agencies which tend to preserve the social good which already exists, are the very same which promote the increase of it, and vice versa: the sole difference being that a greater degree of those agencies is required for the latter purpose than for the former."

Chairman WILSON. Ladies and gentlemen, it is a peculiar pleasure to introduce as the presiding officer for the remainder of the evening the Honorable Henry L. Stimson, former Secretary of State, and an Honorary Vice President of the Society.

(Honorable HENRY L. STIMSON now presiding.)

[12] Presidential address, American Political Science Association, 1914, American Political Science Review, 1915, p. 13.

[13] Quoted by MacIver, The Community, p. 410.

[14] MacIver, *op. cit.*, p. 422. This is the view underlying Art. 11 of the Covenant. It is apparently also the view of Secretary Hull. "Under the conditions which prevail in the world today a threat of hostilities anywhere cannot but be a threat to the interests—political, economic, legal and social—of all nations. Armed conflict in any part of the world cannot but have undesirable and adverse effects in every part of the world." Statement of Sept. 11, 1935, reminding Italy and Ethiopia of their obligations under the Briand-Kellogg Pact.

Chairman STIMSON. I am very happy to have been invited to take the chair from my distinguished predecessor. And I shall proceed to show my familiarity with the proper duties of a chairman by proceeding at once to introduce the next speaker, who will speak on the subject of "Neutrality laws and exceptions to commercial treaties." The speaker will be Mr. Allen T. Klots, formerly Special Assistant to the Secretary of State, now a member of the New York Bar.

NEUTRALITY LAWS AND EXCEPTIONS TO COMMERCIAL TREATIES

By ALLEN T. KLOTS

Of the New York Bar

The above title given to the subject which I have been asked to discuss at this meeting is perhaps open to some clarification. The subject which I have interpreted it to cover may be stated as follows:

Do certain provisions of the so-called "neutrality legislation," including both the legislation enacted by Congress and in addition that which was proposed but not enacted into law, conflict with provisions which are commonly to be found in the numerous commercial treaties to which the United States is a party? Or, putting the question even more narrowly, do the embargo provisions contained in the so-called "neutrality legislation," enacted or proposed, conflict with certain provisions of our commercial treaties?

The legislation actually enacted is to be found in the Joint Resolution of Congress approved August 31, 1935, as extended by the Joint Resolution approved February 29, 1936. This statute provides in substance that, whenever the President shall find that there exists a state of war between two or more foreign States, he shall proclaim such fact and it shall thereafter be unlawful to export arms, ammunition or implements of war from any place in the United States to any such belligerent country, or to any neutral country for transshipment to or for the use of any such belligerent country. The President is authorized to define arms, ammunition and implements of war within the statute. There was proposed at the present session of Congress, in a bill sponsored by the administration, a provision that under certain circumstances it should be unlawful to export not only arms, ammunition and implements of war, but in addition articles or materials used in the manufacture of arms, ammunition or implements of war or in the conduct of war.

I

It will be assumed in the first part of this discussion that the purport and intent of the legislation is solely for the purpose of helping to keep the United States out of war. Let us assume that the objects are those which were expressed in the proposed legislation as "to promote the security and preserve

the neutrality of the United States or to protect the lives and commerce of nationals of the United States," and that the legislation is not directed in any sense as an aid to collective action to curb an aggressor who, let us say, is intent upon violation of the Pact of Paris.

Such discussion as there has been on the subject of the relation of these embargo provisions to our commercial treaties has centered chiefly around the commercial treaty between the United States and Italy which went in force on November 18, 1871. This is an example of current interest, and as this treaty contains most of the provisions on the subject which can be found in the other treaties, I shall direct my observations to it as a concrete basis of discussion.

The treaty with Italy aforesaid contains as its very first agreement, as set out in Article I thereof, the following provision:

> There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation.

It has been asserted that legislation prohibiting the export of arms or the export of materials used in the conduct of war to Italy while Italy was engaged in war with a third country would conflict with this treaty provision. Let us inquire first, by looking at the treaty itself, whether this provision is susceptible of such a broad construction.

To begin with, let us look at the remainder of Article I itself. It goes on to read as follows:

> Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter with their ships and cargoes all the ports of the United States and of Italy, respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories. They shall enjoy, respectively, within the States and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing.
>
> War vessels of the two Powers shall receive in their respective ports the treatment of those of the most favored nation.

It might well be argued that these subsequent provisions of Article I were intended to define what was meant by "liberty of commerce and navigation," as, namely, the right to enter all open ports with ships and cargoes and the right to enjoy the same privileges of commerce and navigation as the natives of the countries themselves. If this is a correct construction, Article I cannot be taken as prohibiting an embargo applicable to all shippers—Americans or aliens alike—of cargoes to Italy in the event of her going to war. This interpretation of the liberty of commerce and navigation clause appears equally reasonable when we examine similar clauses as they appear in other treaties.

Thus, in certain of the more modern treaties, such as those with Finland, Norway, Poland and Austria, we find a clause which reads as follows:

> Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

These treaties all indicate that the clause in question is not intended to convey the unqualified meaning which has been contended for.

In the next place, it is evident from the treaty as a whole that "reciprocal liberty of commerce and navigation" was not intended to mean unrestricted and unqualified freedom. Thus, a customs duty or tariff on imports would constitute a restriction on complete and unqualified liberty of commerce. Yet it is perfectly apparent from the presence of the most favored nation clause contained in Article VI of the treaty that the treaty was not intended to prevent either Italy or the United States from imposing tariff duties, provided the same treatment should be accorded to the other as to the most favored nation. Finally, in Article VI it is provided:

> nor shall any prohibition be imposed on the importation or the exportation of any articles the produce or manufactures of the United States or of Italy, to or from the territories of the United States, or to or from the territories of Italy, which shall not equally extend to all other nations.

Here is an express recognition in the treaty that prohibitions may be put upon either exports or imports by either nation as long only as the most favored nation principle is adhered to. Clearly, the reciprocal liberty provisions of Article I, therefore, were not intended to be taken literally in a completely unqualified sense.

This brings us to a consideration of the provisions of Article VI, above quoted, for it seems quite clear that Article I was not intended to interfere with prohibition by the United States of the export of articles to Italy, provided the same prohibition should be extended to other nations. The question is thus presented whether the embargoes contained or proposed in the neutrality legislation violate the most favored nation principle adopted in Article VI. In imposing, as regards a particular nation which goes to war, an export prohibition which is automatically required to be imposed on any nation at war, are we imposing on exports to that particular nation a prohibition which is not equally extended to all other nations? Frankly, it is difficult to see wherein the discrimination lies. By enacting an export prohibition against all nations who may hereafter become engaged in war, we are not favoring any one nation as against any other. We have, on the contrary, laid down a rule which automatically applies to all countries without discrimination or fear or favor who comply with the qualification of being a nation at war. It is not the act of the United States, moreover, which brings any particular

nation within that qualification. It is either the act of that nation itself which brings it into a state of belligerency, or possibly the act of some other nation for which the United States is in no way responsible. Surely because Italy by her own acts, or by forces for which the United States is in no way responsible, has qualified for prohibitions which apply to all countries meeting the same qualifications, we are not guilty of any discrimination against her, nor have we applied any prohibition which does not equally extend to all other nations.

The foregoing argument would seem to be sound where the legislation is mandatory and where the embargo automatically goes into effect when a state of war is found in fact to exist. Where the President is given discretion to impose the embargo, as was provided in the proposed legislation, a somewhat different question perhaps presents itself.

There is one feature of the Joint Resolution of Congress which was passed at this session, however, which would seem to raise seriously the question whether it can be reconciled with the treaty provisions of the type above discussed. This is the provision which says that the neutrality legislation, including the embargo provisions, shall not apply to an American Republic engaged in war against a non-American State. This would appear to make American Republics especially favored nations, and another nation might well complain that it created an exception not permitted by the most favored nation clause in its treaty with the United States.

II

So much for the construction of the treaty itself and its meaning as applied to the embargoes in question. The next question is whether there are any general principles of international law which, outside of the treaty itself, would permit an embargo by a neutral of shipments to belligerents as an exception to either a general freedom of commerce clause or a most favored nation clause contained in the treaty.

It has been asserted that an embargo limited to arms, ammunition and implements of war is a recognized exception to the provisions of the commercial treaty. For example, Professor Borchard in his testimony before the Congressional Committee in the hearings on the neutrality legislation in January, 1936, stated that this rule was elementary law. In the hearings before the Senate Committee, Mr. Hackworth, the Legal Adviser of the Department of State, cited the fact, among others, that during the Franco-Prussian War, Switzerland, in spite of her commercial treaty with France and Germany, embargoed arms and munitions of war which her decree referred to as *matériel.* In an "Information Department Memorandum" of The Royal Institute of International Affairs entitled *The Most Favored Nation Clause as an Instrument of National Policy,* "war materials" are listed as a recognized exception to the most favored nation clause. In support of such an implied exception it may be argued that since belligerents under inter-

national law have the right to seize contraband, a neutral in order to protect itself from international complications with belligerents must be held to have retained the right to forbid its export. This reasoning is grounded on principles perhaps akin to the right of self-preservation or defense. In other words, a situation might well be imagined where fatal consequences would result from continuing trade with belligerents and where the only way that such fatal consequences could be prevented would be to cut off such trade. Such a situation would appear to be reasonably implied as an exception to an ordinary commercial treaty.

It is a little difficult to see why the exception should be limited to an embargo on arms, ammunition and implements of war. Nowadays, in particular, when the line between contraband and non-contraband material is so hazy and indistinct, it would seem equally reasonable to extend the exception to anything which might be used in the conduct of war, and this applies to most commodities and raw materials. That it could reasonably be extended to anything used in war, particularly where, as in the legislation proposed at the last Congress, only the excess over the normal peace time requirements of the belligerent was embargoed, does not strike one as a violent contention. The chances of a dispute with a belligerent in control of the seas are just as great as to non-contraband as absolute contraband, and the opportunity for arousing international ill will and popular excitement is even greater because of the feeling of injustice that can be created by the seizure of non-contraband. If the embargo is made contingent, moreover, as in the legislation which was proposed, upon the specific finding by the President that the embargo would serve "to promote the security and preserve the neutrality of the United States or to protect the lives and commerce of nationals of the United States," its inherent character as a measure of self-preservation is emphasized.

III

I should like now to consider the subject from a somewhat different and broader aspect. It appeals to me as a more interesting phase of the question, although perhaps a more controversial one. The point referred to is this: Has there come about a development in international law since the World War by which the legal concept surrounding war and the rights and obligations resulting therefrom has undergone a fundamental change, and must the rights of a nation under a commercial treaty be interpreted in the light of such new concept of belligerency?

During the World War and at the conclusion thereof, there developed among the peoples of the world an essentially different attitude toward war from any which had hitherto obtained. It is not too much to say that the nations which participated in that conflict and those which, although not taking part, witnessed the devastation which it brought about, were so impressed with the evils of war that they were determined to impress upon it not only the stamp of disapproval, but in addition the definite stamp of illegality.

This purpose first secured recognition in the Covenant of the League of Nations. It was to assume an even more sweeping and categorical form in the Pact of Paris in which some sixty-three nations of the world solemnly condemned recourse to war for the solution of international controversies, renounced it as an instrument of national policy, and covenanted that the settlement of all disputes between them should never be sought except by pacific means.

The adoption by such a large proportion of the nations of the world of such a general rule of conduct sanctioned by a popular approval and a popular concept which had become almost universal surely must be said to have introduced a new organ in the whole body of international law. Certainly international law is organic and grows just as the common law or any other living body of law grows with the development of human relations and social morality. Among its processes of growth, moreover, there seems to be pretty generally recognized a process that may be termed international legislation. As early as 1907 Mr. John Bassett Moore said during the proceedings of this Society:

> of all the achievements of the past hundred years, the thing that is most remarkable, in the domain of international relations, has been the modification and improvement of international law by what may be called acts of international legislation.

Professor Fenwick in his recent book on international law says: (at page 68)

> In contrast to general principles and customary law, a further source of international law is to be found in the various treaties which embody the express consent of the nations to the rule or rules laid down in the treaty.

As we all know, the Carnegie Endowment for International Peace is publishing in a series of volumes a compilation of treaties which it entitles *International Legislation.*

The Pact of Paris would seem to be the type of treaty preëminently entitled to recognition as international legislation. In contrast to the tenuous and somewhat obscure basis on which some of the recognized principles of international law have been predicated in the past, the formal adoption by practically every nation of the world of such a general rule of conduct, supported by such universal popular demand, would seem to be a pretty solid foundation on which to base a step in the development of international law and a new rule of international conduct, particularly among the signatories themselves. The very breadth and simplicity in form and substance of this treaty denotes it all the more as being the stuff of which fundamental laws are made. The absence of sanctions or provisions for enforcement within its four corners does not prevent its having any the less the force of law. This lack it has in common with most principles of international law. Because of its elemental character, moreover, it can be made to serve in a primary ca-

pacity as a foundation upon which by carefully considered precedent to build brick by brick a structure of lasting and ever growing significance.

It is not surprising, therefore, to witness already the development of a very respectable body of authority to the effect that the principles of the Pact of Paris have a vitally important bearing on the rights of belligerents as now to be understood. Manifestations of this development have appeared from widely divergent sources and directions. As early as 1929 J. L. Brierly in the *British Year Book of International Law* expressed the view that a nation violating the Pact "must not expect to exercise the traditional, or indeed *any*, belligerent rights at sea against other Powers whose treaty rights it is itself violating." [1] When Secretary Stimson on January 7, 1932, announced in his notes to Japan and China that the American Government would not recognize any situation, treaty or agreement which might be brought about by means contrary to the covenants and obligations of the Pact of Paris, and when fifty nations acting in the Assembly of the League of Nations on March 11 of the same year took similar action, also referring expressly to the Pact of Paris, the action in both cases was based on a fundamental recognition of a new status for belligerency in case the belligerent happened to be a violator of that treaty. Such definitive action, taken by so large a proportion of the signatories of the Pact of Paris, denying to an aggressor legal validity of the fruits of his aggression, is entitled to recognition as a precedent of some weight in the organic growth of the law springing from the Pact and in support of the illegal nature of such belligerency.

In a speech before the Council on Foreign Relations on August 8, 1932, Mr. Stimson, then Secretary of State, speaking of war in violation of the Pact of Paris, said:

> It is no longer to be principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead we denounce them as lawbreakers.
>
> By that very act we have made obsolete many legal precedents and have given the legal profession the task of reëxamining many of its codes and treaties.

In September, 1934, further recognition of the new status of war as affecting a belligerent's rights found expression by a distinguished group of international lawyers in the resolution taken by the International Law Association at a meeting in Budapest and known as the "Budapest Articles of Interpretation of the Briand-Kellogg Pact of Paris." I quote from these articles the following as having special relevancy:

> (4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may,

[1] The British Year Book of International Law, 1929, p. 210.

without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:

(a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;

(b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;

(c) Supply the State attacked with financial or material assistance, including munitions of war;

(d) Assist with armed forces the State attacked.

(5) The signatory States are not entitled to recognise as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact.

The above quoted Articles of Interpretation are, of course, based on the concept that hereafter, in so far as a violator of the Pact of Paris is concerned, the making of war is illegal and a perpetrator of such violation is to be thereafter denied the recognition of any position *de jure* either during or as a result of its belligerency.

At the recent meeting of the New York State Bar Association a report of the Committee on International Law was rendered on the recent neutrality legislation. In the course of this report it was stated that the spirit of the Pact of Paris "evidently makes of a nation having recourse to war an outlaw." This committee, under the chairmanship of Mr. Frederic R. Coudert, included among its membership such distinguished lawyers as Elihu Root, John W. Davis, Frank Hiscock, former Chief Judge of the New York Court of Appeals, Robert C. Morris, Thomas D. Thacher, and the late George W. Wickersham.

But perhaps the most interesting and pertinent discussion on the subject of the effect of the Pact of Paris on the rights under other treaties of a signatory who violates the Pact is the discussion which took place in England in connection with the Suez Canal and Italy's use thereof to make war on Abyssinia. In August, 1935, the *Law Times* of London published an editorial on the legal right under pertinent treaties to close the Suez Canal to Italy. The editorial cites the Convention of Constantinople of October, 1888, to which Italy was a party, and also court decisions which have had occasion to interpret that treaty. It comes to the definite conclusion that the canal by treaty is required to be open in times of war and in times of peace and to warships as well as the merchant vessels of all nations, and that it cannot be blockaded. It then expresses the opinion, however, that since both Italy and Abyssinia are signatories of the Pact of Paris, if one should declare war in violation of the Pact it could not complain if the protecting Power closed the Canal.

Again, in *The Law Journal* of London in its issue of August 24, 1935, containing a discussion of the Suez Canal problem and the right to close the canal to Italy, it was said:

> But the international law of war has been radically altered by the Covenant of the League, and the Agreements which have followed it. Italy, if her present Dictator makes war on Abyssinia, would not be embarking on a war of the old type, recognized as a lawful expression of the ambition and demands of a nation. Italy will be a criminal in International Law and the Commissioners are under no obligation to allow the Canal which is under their charge to be used in the furtherance of a crime.

We thus see growing as part of the structure to be built on the foundation of the Pact of Paris a principle that a violator of the Pact is engaged in the perpetration of an illegal enterprise. His offense, moreover, is something more than a mere breach of a private treaty. It partakes of the nature of a public wrong. To say that he has become an outlaw is perhaps expressing the thought somewhat metaphorically, but it does convey the essential idea, supported by the precedents and interpretations above noted, that he shall not be permitted to acquire rights as a result of the perpetration of this public wrong, nor shall he be permitted to possess certain rights while engaged in this perpetration. He must be said to have forfeited many of his rights under international law. Can such a one demand recognition of all his former rights under his commercial treaties? Or looking at it another way, can a commercial treaty be construed so as to prevent a nation from forbidding the giving of aid and succor to one who is thus a public offender?

This reasoning, of course, would only justify an embargo on exports to the aggressor. For the justification of an embargo to the aggrieved belligerent we are remitted to the considerations covered in the first part of this discussion.

The ultimate significance of the Pact of Paris, as in the case of any fundamental law, is going to depend upon the extent to which it is given the effect of law in particular instances as they arise in slowly and carefully picked out progression by those responsible for the administration of international relationships under it. If such progressive interpretation in its administration is accompanied by progressive interpretation among international lawyers, students, and professors of international law, who play such an important part in crystallizing principles of a jurisprudence wherein court decisions are so few and far between, the possibilities of the Pact of Paris as a vital factor in international law would seem to be very great indeed.

Chairman STIMSON. Before we embark on the warmth of the general discussion I want to say that this discussion will, in the first place, be led by Dr. William C. Dennis, President of Earlham College. I take great pleasure in introducing my old friend, Dr. William C. Dennis.

Mr. WILLIAM C. DENNIS. Mr. Chairman, it is a pleasure for me to recall that this is not the first time that Mr. Klots and I have had the privilege of arguing a very interesting question of international law before you, sir.

Ladies and gentlemen, I am sure you will all agree with me that we

have just had the privilege of listening to two exceedingly interesting and able presentations on this general problem of neutrality, each of the length of twenty minutes. I wonder how many of you have thought, as I have, during this presentation that is precisely the length of time, as I recall it, of the general debate allowed in the House of Representatives on the Neutrality Bill, both at the time of its original passage and at the time of its subsequent reënactment and amendment.

Professor Fenwick and I have had the privilege not only of hearing the papers read this evening, but also of reading them over very carefully at our leisure beforehand. And we propose to address you for ten minutes apiece, and then the matter will be thrown open to debate. And I wonder even after all of that additional wisdom has been shed upon the subject of neutrality this assembly, which contains within its membership, I think, as large a proportion of persons qualified to speak on this subject as any assembly we are likely to get together, would feel that after this evening's debate it was qualified to enact neutrality legislation for the United States which might mean the life or death of our sons.

I submit as a preliminary suggestion that these very interesting papers have once more shown how complicated and how delicate these questions of neutrality are, how much they are entitled to the intelligent, thoughtful attention of the Government of the United States. And when we recall the forty minutes here tonight and the forty minutes in Congress—and, of course, I make due allowance for all the discussion in committee, Professor Borchard and a great many other learned gentlemen testified before the Congressional Committees—I submit that the question of neutrality has not yet received that attention at the hands of our Government which it deserves.

I have no difficulty at all myself in following everything Mr. Klots has said, not only as respects these general principles which he enunciated about the embargo provisions and the most-favored-nation clause, but also the to me as to him more interesting portion of his remarks, which dealt with what we might call the application of the Stimson Doctrine to this embargo legislation, the application of the doctrine that a nation like a man may not profit by its own wrong, and that therefore a nation may not acquire belligerent rights when it has gone to war in violation of its treaty obligations: To me that seems to be a perfectly sound extension of the application of the Stimson Doctrine. But, after all, when we are without any means of determining which is the aggressor nation, and when confessedly this application of the doctrine can only apply against the aggressor, this does not actually give us any very great assistance, I suppose, in the practical administration of our neutrality laws.

Professor Jessup has very well said that we want neutrality laws to keep us out of war, that neutrality laws which simply define rights or give rights which we must fight to maintain, are not of any great practical use to us. And so it is, I suppose, at present with the rights which a neutral

nation may acquire under the Kellogg Pact, valuable as they are in principle and valuable as we hope they may some time come to be in practice.

Right now I suppose the situation is like that which occurred in my home town when two highly respected lawyers got into an altercation. One of those men was a man of national reputation whose name would be known to most of you here. He resented certain aspersions cast upon his professional conduct by his brother lawyer, with the result that the brother seized a heavy notarial seal and started for him. The gentleman, not wanting to be pounded with that seal, seized the hands of the aggressor, and they swayed to and fro, each struggling to get the seal. Inasmuch as this scene had taken place right in open court, something had to be done about it; so a proceeding was had. Everybody wanted to hush the affair up as much as possible, so they put a distinguished lawyer on the stand to testify as to what happened. He told how each combatant tried to get the seal to protect himself. And the cross-examining attorney said, "Your testimony then is to the effect that each of these gentlemen was endeavoring to prevent the other from committing a breach of the peace?" and the answer of the witness was, "Yes; that is it exactly." The court so found; and nobody was any the worse for the wear.

Now, of course, that is the way it is with modern war. Nobody is ever the aggressor in a modern war, so far as his own admissions go. And until we have some court that is able to pass upon that question, the Stimson Doctrine does not do us much practical good in determining our neutral rights. Perhaps the time will come when we will devise a means of determining who is the aggressor.

Mr. Vandenbosch proposed the question of neutrality versus collective security. On his very able analysis of the question, I think he held the balance very level between the two alternatives or two horns of the dilemma—neutrality and security, that is, collective security. If I am not mistaken, he leaned a little bit towards the latter alternative, towards collective security, at least, in the future. I suppose most of us would agree with that. Eventually we must look forward to a world governed by law where the subjects of international law, like the subjects of municipal law, do not resort to breaches of the international peace to assert their rights, where nations no longer prosecute their rights by force. But "eventually" may be a long time; and it looks at present as though it will be a good while.

Collective security now only means to many of us intervening to maintain the status quo under the Treaty of Versailles. And to many of us, not merely to the nations smarting under the Treaty of Versailles, but to many of the inhabitants of the neutral countries that means something unthinkable that we should intervene in behalf of collective security in order to repress nations seeking to escape from the manifold injustices which, in my judgment, are imposed upon them by that treaty. And they are seeking to escape not merely from injustice but from the manifold burdens from which, as it

seems to many, they were entitled to be exempted under the terms of the armistice.

I happened to be out in China during the time of the making of the Treaty of Versailles. I have here with me a little book which I have worn by much use. That little book contains the speeches of President Wilson. It was translated into Chinese and was circulated among the people out there. But the copy I have is an English copy because I read it more easily in English! And there were a large number of people, the intelligent leaders of China, who understood those speeches perfectly. The Treaty of Versailles was a tremendous blow to the aspirations of the people of China, just as it was to the people of the Central Powers.

I do not think collective security for the maintenance of that *status quo* is possible as a matter of practical politics for the United States. To be sure, a great deal has been done to relieve that treaty. It has been done by the efforts of the United States. We no longer talk about hanging the Kaiser; reparations have had their Young Plan, Dawes Plan, and finally the Hitler Plan, and armaments have recently been equalized under the latter. There is a process of readjustment going on. And I venture the prediction the process will lead to the same results as did Russia's insistence on having a fleet in the Black Sea in 1870.

In the meantime the United States has a right, I submit, to keep out of war. And the only way I can see by which we can do it is by neutrality, by the neutrality of George Washington, brought down to date to the present time. For the present we need neutrality, that is the strong hand of a man in Washington who can keep his head. The application of that sort of neutrality brought up to date by that type of man will bridge the time between now and the day when we can have collective security.

Chairman STIMSON. The discussion will be led also by Charles G. Fenwick, Professor of Political Science, Bryn Mawr College.

Professor CHARLES G. FENWICK. I do not have anything new to say on the subject of neutrality. For some twelve years members of the Society have been listening patiently to a reiteration of the same old thing year after year. Neutrality is the negation of law and order. Neutrality is a denial of the principle of collective responsibility upon which any system of international law must rest. Neutrality is contrary to the fundamental conceptions of law which have prevailed between man and man in every civilized State and prevailed between State and State in the United States. I am reluctant to enlarge upon views already familiar to you. But I was much impressed with the closing pages of Mr. Klots' paper. I thought he offered some very interesting suggestions. May I say a word on that point?

As I see it, in our municipal law, if I have a contract with an architect to build a house and the architect commits a criminal act and is sent to Atlanta for six months, I do not understand that I have to suspend building operations until he comes out of jail. Nor do I understand that I must continue my

negotiations with the architect with respect to the design of the house while he is in jail. His violation of the criminal law puts an end to the private treaty or contract between us. So it seems to me simple enough that when a nation commits a crime, that puts an end to commercial treaties which are not consistent with the fact that the criminal is being boycotted or otherwise penalized by the community of nations.

Last night I heard a different view. Perhaps the discussion may bring out that view again. It was then suggested that it was too bad that a nation should violate the Kellogg Pact; but, after all, there was nothing to be done about it. Under the so-called Bryan Treaty you would have to sit around a year and wait before anything could be done, because we were bound by that treaty; and if we had a commercial treaty we would have to keep on dealing with the outlaw country in spite of its outlawry. That may come up again this evening.

Now, just a word about Mr. Vandenbosch's paper. The Program Committee asked the impossible of him. What relation is there between neutrality and peaceful change? It was a very interesting and stimulating paper. But try your best, Mr. Vandenbosch, you cannot get any connection between neutrality and peaceful change. Neutrality represents an attitude of indifference to crime, an attitude of so-called aloofness to a war, whether one openly declared or a situation which the President may regard as war, as the present situation between Italy and Ethiopia, which is not a formal war. I can see no relation between neutrality and peaceful change. But there is a great deal of relation between neutrality and forcible change. But I was much interested in the effort that Professor Vandenbosch made to extricate himself from an illogical situation. He suggested something very interesting. It was this curious paradox that has marked our whole neutrality policy. It is a policy of political isolation but economic contact.

I do not know how Mr. Dennis—whose views I followed all through, almost to the end—managed to wind up on a note of approval of Washington's policy. It was inconsistent with everything that went before, as I see it—but perhaps I misinterpret him. Washington and Jefferson both insisted upon political isolation, but were equally determined to have economic contact. Jefferson, as early as 1793, wrote the famous letter in which he said, "Our people have always had the right to trade in arms. It is the constant occupation of many of them, and there is nothing in international law to prevent it." Some fifteen years later he realized the implications of that economic contact which was quite inconsistent with political isolation, and he imposed an embargo. And the whole of New England rose up in outrage. They said, "We do not so much mind one ship in ten being captured, but we do insist upon getting good profits out of the other nine." They would not have an embargo; and the embargo policy was a failure although it was the logical and consistent thing to do. And Jefferson, a political philosopher, soon realized he was running counter to the desire for profits which was stronger than the desire to

keep out of war. New England merchants simply preferred to have one ship in ten captured if they could make big profits on the others.

The World War came and we declared our neutrality; but we insisted upon economic contact, in spite of the political isolation. Then the new era of collective security begins, and the United States continues its political isolation. But are we consistent? Are we having economic isolation? Oh, no,—economic contact of a very close character. Congress surrendered last winter, and instead of following out the logic of the thing and having complete economic isolation to match our political isolation, they went no further than to give up trade in arms and ammunition, which after all, Italy did not want and Ethiopia could not get. But on all of the rest, in which there was a profit, we maintained the economic contact.

The paradox of preaching political isolation and demanding economic contact is awkward; and some day this country will come to its senses and wash its hands and do one thing or the other—be consistent, stay out, or go in.

Chairman STIMSON. The discussion is now open to the house. But the Chair, by the very stringent rules which have been put into his hands, is under the duty of announcing that each speaker will be limited strictly to five minutes.

Mr. DENNIS. Mr. Chairman, may I have just thirty seconds? I was well aware of that letter of Jefferson's. I said Washington brought down to date. I meant the iron determination of Washington not to fight for foolishness, which he showed in 1794, brought down to date.

Professor FENWICK. Mr. Chairman, may I remark that I do not understand the emphasis upon Washington brought down to date.

Chairman STIMSON. What is the pleasure of the meeting?

Professor HERBERT WRIGHT. I plead guilty to the "curious" opinion about the so-called Bryan Peace Treaties criticized by Professor Fenwick. It is a curious opinion which has been shared and is shared also by Mr. Bryan's successors, one of whom is present as your Chairman this evening. I find that I am unable to understand an equally curious opinion expressed by Professor Fenwick, namely, that treaties such as the Bryan treaties, the very object of which is to prevent war, should be put aside if any controversy should arise in which there is an alleged aggressor.

Chairman STIMSON. May I invite my friend Professor Borchard, of Yale, to take the stand for a brief five minutes? I understand he is in what I have heard an eminent magnate on Wall Street call a "receptacle condition."

Professor EDWIN M. BORCHARD. Mr. Chairman, it is hard to know from what point of view to approach the subject of the evening. I rather prefer the humorous approach. In the law schools now we teach the functional approach. I somewhat regret that in the American Society of International Law we develop so much of a theological and somnambulistic approach. I appreciate the eminently moral desires of Mr. Fenwick, and I share his ideals; but I do not see that his preaching to the world is getting us anywhere. They just won't accept his instruction.

Now, these plans for collective security and the enforcement of peace have been floating around for the past fifteen years. That includes the Kellogg Pact. They were described correctly by Mr. Charles Dupuis, a very distinguished Frenchman known to most of us, who stated that they were "precise, clear, logical, chimerical and impractical." We are now dealing with a world that is a hard, practical world, and we are invited to consider schemes that are even less effective than the recent Naval Treaty which has been described as the Swiss cheese treaty, because it is so full of holes. These schemes, like the Kellogg Pact, are just one great void.

There is nothing that legally binds in the Kellogg Pact. I ventured to say in 1928 when the Pact first came out, and I have had no reason to change my opinion, for the conduct of the nations of the world would rather seem to confirm it, that you just can't lift the world by its bootstraps; and my humble opinion is that the "writing up of international paper," as Harold Nicolson calls it, only injures the law and human society. You do great damage to the law when you ask so much of it. You wipe away what safeguards you have and put nothing but chimera in its place. You have therefore aided disorder and chaos and hence you have this constant increase in armament. "Sanctions" have promoted the disintegration of international relations.

Now, I would like to talk as a lawyer for a moment and address myself to Mr. Klots' analysis of commercial treaties. Perhaps I bear a little responsibility for having suggested the subject. I do not read Article 6 of the Italian Treaty of 1871 as a most-favored-nation clause. In my opinion, it is not. It states that the United States will not prohibit the export of any produce or manufactures of the United States to Italy which it does not also prohibit "to all other nations." The minute Italy is embargoed on some commodity or other—with the exception I shall mention hereafter—which is not made universal, for self-defense or other reasons, such as tin now, I think we would have a clear violation of Article 6. Moreover, the extension of the term "contraband," even if a neutral were now to initiate the classification, to commodities other than strictly "arms, ammunition and implements of war" might be deemed to be foreclosed by Article 15, which specifically prescribes what shall be contraband. But the whole theory of coercing other peoples, that is, imposing your will on them, instructing them how to be good, in fact enforcing goodness upon them, is doing more damage to law and to peace than I have time now to mention. Thomas Baty and others noted the consequences years ago. The theory of sanctions is producing a condition of universal disorder and helping to strangle the world, economically and politically. Trade treaties and sanctions are mutually exclusive. No nation will henceforth wish to be dependent upon any other. And that is contrary to what we have been taught to believe in as a way to peace or international health. These are not helpful ideas; they are destructive ideas,

in my humble opinion. We have now had the experience and you can see where it leads.

The real point of controversy on Article 6 has been not whether it operates as Mr. Klots suggested—to embargo secondary commodities to Italy if other belligerents are included—but whether you could embargo arms, ammunition and implements of war to Italy under that treaty, unless you embargo arms, etc., to *all* countries. Some maintain, and in the Department of State they maintain, I think, that you cannot embargo *anything* under the literal terms of that treaty which you do not embargo to all nations. Going further, I have ventured to maintain that embargoes on arms, ammunition and implements of war, by reason of the fact that since 1854 they have been so constantly applied by so many neutral nations, are now a recognized exception to the obligation to trade, and that a neutral country is privileged in defense of its neutrality to embargo arms, ammunition and implements of war, strictly defined as that term is defined, without exposing itself to the charge that it thereby violated a commercial treaty. That is my humble opinion.

On the question of maintaining American neutrality I would still prefer to follow the advice of George Washington rather than that of my good friend, Charles Fenwick.

Professor KENNETH COLEGROVE. With reference to Professor Borchard's warning that we should not make a theological seminary of the American Society of International Law, may I call attention to the fact that the sphere of the jurist is not only to try to discover what is law, but also is to guide and advise the legislature as to what should be enacted as law. And the second function is not less important and useful than the first.

Now, with reference to the question of neutrality, I wish to point out a fallacy of the isolationists. That is their assumption that the United States traditionally has followed a policy of isolation and neutrality rather than a policy of international coöperation. It is true that toward Europe our traditional policy has been that of isolation and neutrality. But toward Asia our traditional policy almost from the beginning has been a policy of intervention and international coöperation for the purpose of keeping the peace and promoting the welfare of the community of nations.

Our international coöperation in China began as early as 1854, at the time of the Taiping Rebellion. In 1864, we participated with Great Britain, France and Holland in maintaining the free passage of the Straits of Shimonoseki. In 1899, Secretary Hay won general recognition for the Open Door Policy. In the following year, at the time of the Boxer Rebellion, we joined the European Powers in a collective intervention in China. In 1921, in the Washington Conference, we carried out an active policy of international coöperation looking towards the maintenance of the Open Door. And finally, when Secretary Stimson enunciated the Stimson Doctrine, and later when the League of Nations accepted this doctrine as the last pledge in the Sino-

Japanese crisis, the United States again coöperated in the international régime of the Pacific.

And thus, Mr. Chairman, our policy in the Pacific has consistently been a policy of international coöperation to the end of maintaining peace and promoting the welfare of the society of States. And such a policy is the very negation of neutrality.

Mr. FRITZ GROB. May I point to another point of approach? Mr. Klots has tried to show a juristic connection between the Briand-Kellogg Pact and the neutrality resolutions. He said: Italy has violated the Briand-Kellogg Pact, *ergo* are the United States entitled to follow their neutrality policy as laid down in the neutrality resolutions? I do not think this argument is correct. I am ready to accept it as a political one, but I am not ready to accept it as a juristic one.

You will remember that the Briand-Kellogg Pact was at first proposed only between two States, between the United States and France. Later on other States were approached by the negotiating parties, and at the end we had, as viewed from the United States, one and the same promise—the promise to renounce war as an instrument of national policy—given not only in the one direction from the United States towards France and *vice versa*, but in about fifty-five or sixty directions and *vice versa*. The outcome was a bundle of bipartite treaties. When Italy went to war with Ethiopia, she certainly violated her promise given to Ethiopia, but she did not violate the promise exchanged between her and the United States.

I am unable, therefore, to see a juristic link between the Italian treaty violation and the neutrality resolutions, and I wonder how one would establish it. I am afraid that one might refer to a term used this evening, to the term "international legislation," meaning by that a treaty of a mysterious and superior kind, being binding like legislation. At the Budapest meeting of the International Law Association, the Briand-Kellogg Pact has even been called "international constitutional law." There is, in my opinion, no reasonable place for the terms "legislation" and "constitutional" in the field of international law. I cannot prove that right now. To prove it would take more time than I have at my disposal now. Other terms used by international lawyers—international government and international organization, for instance—likewise have no reasonable standing in international law. International lawyers and municipal lawyers are traveling, so to speak, in the same boat. They are both lawyers. Yet they are constantly using the same terms and meaning different things, if they mean any clear concept at all. This situation is very regrettable, for international lawyers and municipal lawyers seem to have the greatest difficulty in understanding each other.

Professor JAMES W. GARNER. May I ask Mr. Dennis a question? I am afraid I may have misunderstood something he said. He left me with the impression that he was opposed to any system of collective security because perhaps it will be employed to preserve the *status quo* under the Treaty of

Versailles. Now, Mr. Chairman, as a believer in the system of collective security, I must object to having it identified with any scheme for preserving the *status quo* under the Treaty of Versailles.

Chairman STIMSON. Will you not come up and take the platform, Professor Garner? Your question seems to be quite a long one.

Professor GARNER. I cannot see, for example, any system of collective security which would protect Ethiopia from the flagrant spoliation to which that country is now being subjected. Would such a system have any connection whatever with the preservation of the *status quo* under the Treaty of Versailles?

Towards the end of Mr. Dennis' speech he indicated that he preferred a system of neutrality to a system of collective security, which would keep the United States out of war. Now, ladies and gentlemen, if Mr. Dennis or anybody else is under the illusion that any system of neutrality will afford a guaranty that will keep the United States out of war, I would like to have him read Mr. Woolsey's editorial in the last number of the *American Journal of International Law* on the fallacies of neutrality.

Chairman STIMSON. Mr. Dennis, do you care to have one minute or five minutes in order to answer?

Mr. DENNIS. Mr. Chairman, I do not know that I am entitled to any more time. I quite agree that the particular situation at this moment over in Abyssinia has no direct relation to the Treaty of Versailles. But the question whether we should embark upon a policy of collective security has a vital relation to the treaty. It would take twenty or thirty minutes to attempt to show what Washington might do now. But the courage of a man who really kept us out of war—who rode between the howling mobs in Philadelphia and looked between his horses ears and let them howl—that primarily is what will keep us out of war.

Mr. EDWARD DUMBAULD. After these gentlemen have told you what they have told you for fourteen years, I hardly think it would be right if I did not take the opportunity to repeat what I have been saying for about five years or so. However, I am glad that some originality was put into the meeting by the speaker before Professor Garner, who has a very ingenious idea regarding the bilaterality of multilateral treaties.

What Professor Fenwick and Professor Borchard have been telling us for these many years seems to be considered by Mr. Dennis as having bearing upon the question of keeping out of war by means of neutrality. But, as Professor Garner has said, neutrality is not a method of keeping out of war; it is a method of keeping impartial in a war. And if you insist upon neutral rights, that is one very certain way of getting into a war.

Of course, I do not know how to keep out of war. I wish I did. I think there are a lot of people who wish they knew. In fact, a lot of young students might have gained five thousand dollars in Eddie Cantor's contest if they had known how to keep out of war.

But the point which I do want to make is one with respect to George Washington, who not only looked between his horse's ears in Philadelphia, as Dr. Dennis has said, but also had seven horses shot from under him out near Fort Necessity, in the region of Pennsylvania from which I come. He is said to have said that if you wish peace you must prepare for war. Therefore, I conclude that it is possible to keep out of war by preparing for war and announcing your firm intention of exterminating anybody who does not do what you think ought to be done. In other words, you may keep out of war, not by being neutral, but by going in and being extremely belligerent. Consequently, I do not see that neutrality, whether that of Washington, or Fenwick or Borchard, is a guarantee of keeping out of war.

Professor NICHOLAS J. SPYKMAN. Our efforts to deal with the problem before us merely in terms of a positivistic conception of international law have not been successful. We have inevitably been led to a discussion of policy and not merely to a discussion of what the policy of the United States is, but what it should be. I, for one, welcome this discussion because a clarification of this issue seems to me very necessary.

I regret that the previous speakers have stated their respective positions in such extreme terms, that we have been tempted again to deal with the problem in terms of absolutism. Perhaps the predominantly legal tradition of our Society is responsible for that. Our distinguished members are in the habit of thinking of themselves as counsel for the plaintiff or the defendant, or perhaps even in terms of guilty or innocent. Whatever may be the value of such an attitude in a court of law, it is not an attitude which is very helpful in arriving at a formulation of policy. Policy by definition does not deal in absolutes, but in relatives.

Some of us can determine the right policy by almost intuitive processes. Mine is a more analytical approach, and although I do not claim that my results are any more valid, I think that by stating how my conclusions are arrived at, I offer an opportunity for more fruitful discussion.

If I try to analyze what is involved in the process of determining policy, I find the following elements: A set of basic assumptions, a definite view regarding the nature of the situation to be dealt with, certain ideas regarding the probable results of the policy pursued, and a series of value judgments about desirable ends and more or less desirable means.

Basic Assumptions. My basic assumptions are the following: The first is to be stated in the negative form. I do not believe that the world can be divided into good people and bad people, and that the bad people want war and live east of the Atlantic, and the good people want peace and live west of the Atlantic. The second can also be best stated in the negative: I do not believe that the United States is so isolated from the rest of the world that it runs no risk of ever being a belligerent. That means that I would like to pursue a neutrality policy which, if generalized, suits the United States both as a belligerent and as a neutral. The third basic assumption is the

following: It is conceivable that the United States might some day modify its unilateral security guarantee called the Monroe Doctrine into some form of collective security system. That means that I would like to pursue a neutral policy which, if generalized, suits the United States both as a member of a security system and as an outsider.

The International Situation. Policy is not pursued *in vacuo*, but in regard to a particular historical situation. A policy for the future must therefore be based on our views of the present international situation and on our expectations regarding its future trend. It seems to me that to say that this international world is made up, on the one hand, of the United States, which pursues a policy of isolation, and, on the other hand, of the rest of the world bound together in a system of collective security in which all wars are illegal, is fallacious. In the first place, some of the great Powers have left the League system. In the second place, the League system, whatever the implications of the Kellogg-Briand Pact, recognizes the use of force in three different forms: private war, authorized self-help, and sanctions.

It is also important to remember that the United States, instead of being an isolationist Power, is the most wholesale and whole-hearted guarantor of territorial integrity and political independence in the world. Since the interpretative resolutions of Article 10 and Article 16, no League member has an assurance of outside support in case of attack comparable to the assurance given to the Latin American States by the Monroe Doctrine. If the Monroe Doctrine is still alive as a declaration of policy, we are committed in advance to the position of belligerent in a large number of wars which are at least theoretically possible. If the Monroe Doctrine should become generalized, as has been suggested, and its principle incorporated in a Pan American multilateral treaty, the result would be that our rôle of guarantor, instead of merely resulting from a unilateral declaration of policy, would become an international obligation. That would mean a system of collective security for the Western Hemisphere against aggression originating in other continents.

Voices have also been raised in favor of a system of collective security in the Western Hemisphere against aggression originating within this continent. If this should come about, it is not likely that the system would be more water-tight than the League system, and according to all probability there would therefore be again three different legal uses of force: private war, authorized self-help, and sanctions.

A far-seeing neutrality policy for the United States would, therefore, have to envisage the possibility of being faced with three different types of situations and with two possible rôles in each of these situations—the rôle of outsider or of participant. In this connection it is important to remember that if the European and Asiatic countries accepted our neutrality policy for themselves, a system of collective security on the Western Hemisphere might be forever impossible.

It is true that the efforts to create a system of collective security have not been very successful, but it is a safe prediction, I think, to say that the search for collective security will continue. The experience with the League system during the last fifteen years permits certain general observations in regard to the approach that must be made if collective security is to be achieved. The effort to create one world-wide security system has failed. Moral sanctions are nonexistent, economic sanctions have proved to be very slow and ineffectual unless applied on a world-wide scale, military sanctions are imperative, but from their very nature possible of application only in a limited area.

That means if collective security is ever to be achieved it must be organized on a regional basis with graded responsibilities. Military sanctions and political coöperation for peaceful change must be provided for within the regional system. Economic sanctions, to be applied to an aggressor within one regional system, must be supported by the members of other regional systems.

Ethical Considerations. Policy is determined in the light of certain ethical considerations. A neutrality policy for the United States should be guided by the interests of the United States tempered by the concept of reciprocity, that is, we should be willing to have others do unto us as we plan to do unto them. This means that before adopting a policy for ourselves we should analyze its complications and see how that policy would affect us if pursued by others.

Conclusions. On the basis of the preceding considerations, I should like to recommend a neutrality policy along the following lines:

Private War. Insistence on the full rights of neutrals and the "Freedom of the Seas."

Authorized Self-help. If, when and where a regional system of collective security, of which the United States is not a participant, authorizes self-help to one of its members, the United States shall pursue a policy in conformity with the other members of the system. This policy is conditional upon reciprocity. Some day our interventions in Central America and the Caribbean may have to take the form of authorized self-help.

Sanctions. If, when and where regional systems of collective security are operative, the United States, if it is an outsider, shall accept the decision of aggression which the system makes, shall not consider the sanctionist Powers as belligerents, and make sufficient distinction in policy toward aggressor and attacked to permit the operation of a system of economic sanctions. This general policy to be conditional upon reciprocity in regard to the treatment by European and Asiatic Powers of any security system in the Western Hemisphere of which the United States may become a party.

Chairman STIMSON. The discussion is open to the house.

Professor ELLERY C. STOWELL. I want to ask Mr. Warren if he will not talk on the subject at this time, Mr. Chairman.

Chairman STIMSON. Mr. Warren, you have been invited to take the platform.

Mr. CHARLES WARREN. Mr. Chairman, I did not come here tonight with any intention of speaking, because I have spoken and written so much on this subject that I think all of you are pretty well weary. Therefore, I am not going to talk in any way on the general subjects that have been discussed.

I was rather intrigued by a word which one of the speakers used this morning. I am trying to think just how he expressed it. What I am going to say will be, in his language, an instance of "specificity." To me that is a delightful term. I am very glad to learn it. It means that I am simply going to point out one concrete thing. Professor Fenwick has said that he has been talking for fourteen years on this subject. Now, I am going to call your attention to something that is brand new, absolutely brand new in all discussions of neutrality and of neutrality legislation.

During the debate and in the discussions in the press and in the committee hearings on the recent neutrality bill, great alarm was expressed at the proposal to put any power or any discretion in the hands of the President for fear that he might exercise that power or that discretion in such a way that he might create an unneutral situation, that he would put this country into unneutral behavior. And such were the fears in the Senate and in the House of Representatives of the possibility of the President of the United States deliberately putting this country on an unneutral basis, that they refused to consider the proposal to give discretion to the President to impose embargoes. I am not discussing whether that was a right or a wrong decision. I merely want to say that they so feared the possibility of the President of the United States indulging in unneutral conduct.

Then, what did the Congress of the United States do? For the first time, so far as I know, the Congress of the United States deliberately enacted a measure in which they proclaimed that under certain circumstances the United States would be affirmatively and deliberately unneutral. This is what they enacted. After providing for an embargo on arms and munitions and implements of war, and an embargo on loans and credit, they said, "This Act shall not apply to an American Republic or Republics engaged in war against a non-American State or States."

That is, if an American Republic were engaged in a war with a European State, that Act forbade the exportation of arms and munitions to the European State, and forbade loans and credits to the European State; but at the same time and in the same breath we could provide arms and munitions and loans and credits for the American State. That was ostensibly, I think, on the Monroe Doctrine idea. But the Monroe Doctrine has to do with the occupation of territory in the western hemisphere by European Powers. It has nothing to do with a war which might not be conducted in the western hemisphere at all.

But Congress went further in stating that it would be deliberately un-

neutral, because it said that this elimination of the embargo in favor of an American Republic should not apply in case the American Republic is "cooperating with a non-American State or States in such war." In other words, Congress made the freedom from embargoes for an American Republic contingent on such Republic not being allied with a European Power.

I cannot read that Act in any other way except as a deliberate announcement that the United States would deliberately and affirmatively be unneutral. I am not saying whether it is right or wrong as a policy; but I am simply saying that it is a most ridiculously inconsistent position for an American Congress to take—to distrust the President of the United States and refuse him power lest he might exercise it in an unneutral way—and then deliberately to declare to the world that we propose to be unneutral in case an American State is involved with Europe in a war.

Professor FENWICK. I hope very much the Chairman will not conclude the evening session, assuming no one else wishes to speak, without himself giving us some contribution.

Chairman STIMSON. When I assumed the onerous burden of this chairmanship, Mr. Fenwick, I confess I did it upon the assumption that by so doing I enveloped myself in the traditional mantle, even if I think it is an absurd mantle, of American isolation. I think I foresee very great danger in violating that assumption. I have expressed myself on occasions when it was expected, and sometimes, perhaps, when it was not expected. But I think that tonight, when we have had so many expressions, that I will excuse myself from the burden of anything more.

Is there anyone else who wishes to speak?

Professor BORCHARD. Mr. Chairman, may I say just a word in response to Mr. Warren's last statement?

The reason those who were opposed to Presidential discretion in this matter advanced—and I was one of them—was that after the outbreak of a war and after it had been in progress it would be practically impossible to apply a commodity embargo except for a purpose, and that purpose would be to handicap some belligerent. It would hardly be used in any other way. The President would expose himself to interested propaganda that wished to penalize some particular belligerent. It was thought inadvisable to expose him to that danger, and the committee and Congress agreed. That is, the power of commodity embargoes enforced after the outbreak of war could hardly be used in any other than a discriminatory way, exposing the United States to a charge of violating neutrality.

I agree fully with Mr. Warren on the subject of Latin American countries. But the Monroe Doctrine itself is a promise to make war if the injunctions of the doctrine are violated. This new amendment is an implied promise of unilateral help to a Latin American country if for any reason, even beyond the Monroe Doctrine, it should be at war with a non-American country. That is, perhaps, a part of the "good neighbor" policy of giving

things away and getting nothing in exchange. At all events, I agree with Mr. Warren that it is quite unneutral.

Mr. BROOKS EMENY. In connection with Professor Borchard's observations, there is one aspect of neutrality legislation that I would like to submit, and that is, whether we have discretionary or mandatory embargoes against other nations on material makes very little difference so far as the example we are setting for the rest of the world is concerned. It just so happens that the United States is the one great Power in the world that is so situated that the ordinary types of blockade cannot be effective. In fact, it reduces itself to this factor, that the only way in which we as a belligerent could be affected would be, not through blockade of our own coasts, which it is impossible to make effective, but through the prohibition of exports of essential raw materials at the sources. In both mandatory and discretionary laws we are assuming that we will never be a belligerent; in other words, that we are a moral teacher to the rest of the world. But I submit that we are in the position today where it is rather dangerous for us to start a type of doctrine or to teach the rest of the world a kind of doctrine which, if adopted by them in principle, at least as applied to America, is the one means by which they may be able to make our situation peculiarly embarrassing at such time as we may become belligerent. The only way in which you can affect the war power of this country is through the prohibition of materials at the source, because we are not in the position where we can be blockaded effectively around our own shore by possible enemy Powers.

Professor QUINCY WRIGHT. Mr. Chairman, I want to say a word about the problem of executive discretion in regard to neutrality as it was raised by Professor Borchard. It seems to me the problem bears very closely upon the suggestions which Professor Spykmann made in regard to the appropriate approach to this situation. As I understood Professor Spykmann, he emphasized the dangers of a policy which was absolutely unrelated to the characteristics of the particular war. He insisted that one policy might be appropriate for a war in which the aggressor had been determined, another policy for a war in which no such determination had been made. It seemed to me that his reflections on that problem were very cogent, and I should like to urge that his suggestion implies a considerable executive discretion in the carrying out of an adequate neutrality policy. If we are not going to allow any executive discretion, it means that any adaptation of our policy in view of the circumstances of the particular war would have to be by Act of Congress.

I think we can appreciate that there are certain dangers in that. There is more danger in changing policy by Act of Congress after war has begun than in adapting by executive action a policy which has been stated in general terms before the war. This is because the Congressional debates, the propaganda, the opportunities for public opinion to become excited, inevitable with Congressional action, might very well mean that any action

taken would be interpreted as a virtual entrance of the United States into the war on one side or the other. On the other hand, an adaptation of a broadly stated policy by the executive would not have such an effect. Opinion would regard the matter as merely administrative and not get excited.

Thus it seems to me any realistic policy with regard to neutrality implies a high degree of executive discretion. I am aware, of course, that Congress is unwilling to delegate authority. I am also aware that an inferior Federal court has recently held delegation of authority to the executive in regard to the Chaco embargo as unconstitutional. That issue has not as yet gone before the Supreme Court. I think it probable that the Supreme Court will determine the question according to the degree of specificity with which Congress has defined the circumstances in which such an embargo can be imposed.

I would urge that the appropriate policy would be one in which an impartial application of whatever embargoes may be determined upon by Congress is required on the outbreak of war, but with executive discretion to relieve any belligerent of the burden of that embargo in case it is determined by the executive that, in accord with treaties to which the United States is a party, that particular belligerent is the innocent victim of aggression.

Chairman STIMSON. Are there any further speakers? If not, I shall declare the meeting at an end, unless the Secretary has some further announcements.

Secretary FINCH. The only thing I wish to say is that at ten o'clock tomorrow morning there will be opportunity to discuss any of the papers that have been presented at the previous sessions of the Society. So any member who has an idea lurking in his mind that he may be too modest to divulge before this large audience may come to our smaller gathering tomorrow morning at ten o'clock and get it in the record.

Chairman STIMSON. I shall now declare this meeting closed.

(The meeting adjourned at 10:22 o'clock p. m.)

FIFTH SESSION

Saturday, April 25, 1936, 10 o'clock a. m.

The meeting was called to order by Professor GEORGE GRAFTON WILSON, presiding.

Chairman WILSON. The first matter, I think, is for the Secretary to read a cablegram we have received from the *Institut de Droit International*, a reply to the cablegram that we sent. Mr. Finch will probably read it first in French, and then for the benefit of those who do not speak French he will translate it into English.

Secretary FINCH. The cablegram is as follows:

> Prondément touché vos aimables voeux, Institut Droit International adresse American Society International Law vifs remerciements et expression cordiale sympathie.

This is signed by "De Visscher, Secrétaire Général."

[Translation]

> Profoundly touched by your good wishes, the Institute of International Law addresses to the American Society of International Law its best thanks and an expression of cordial sympathy.

Chairman WILSON. You will recall that on the first evening we sent a greeting to President Scott, who was at the meeting in Brussels, and this is the reply from the Institute. That meeting was to be held in Madrid, but was transferred to Brussels.

The first item this morning is the concluding of preceding discussions. The preceding discussions had to conclude at the specific time set. These discussions also will have to conclude at a specific time, but we hope that all of that time will be occupied. Anyone may take part in any discussion relating to any part of the program from the start to the adjournment last evening. You may make any remarks you please in regard to the program or in regard to what any person has said who has spoken on the program.

I shall recognize Professor Fenwick, because I know he did not finish all he had to say.

Professor CHARLES G. FENWICK. Yesterday Professor Yntema raised a very interesting question, but we did not have time to discuss it adequately. As I understood him, I gathered he felt that the equity jurisdiction of a World Court—let us say the Permanent Court—following more or less along the lines of the equity jurisdiction of our own courts, gives ample opportunity of enlarging the law to meet new conditions. And he referred to what I think is one of the most profound and most illuminating studies in international jurisprudence. I regard Professor Lauterpacht's *The Function of Law in the Interna-*

tional Community as one of the great contributions to our subject. Would Professor Yntema enlarge a little bit on the extent to which he feels the equity jurisdiction of a Permanent World Court could enter into what we call the legislative field and bring about those changes that we have been discussing as necessary to the development of a more adequate law?

Professor HESSEL YNTEMA. In response to Professor Fenwick's suggestion, I think it should be explained that yesterday morning I was endeavoring to outline for you some of the considerations or general features which seemed to me to condition this problem, looking at it from the point of view of comparative legal history and jurisprudence in general, looking at it from that point of view without too immediate reference to the problem in the international law field, and accepting the main thesis that I think underlies Mr. Lauterpacht's suggestion, namely, that if it be sought to establish a basis for a critique of present international law—and the same would be true of any particular system of municipal law—it is valid to start from a comparative study of existing systems of legal ideas. In other words, the premise is that one of the best methods of approaching the question as to what ought to be done in a particular field of law is to study the problem from what we might call a scientific point of view, namely, from the point of view of a comparative examination of the historical background and the development and the present status of legal ideas. I am saying this because what I have to say and what I had to say yesterday morning is predicated upon that point of view.

Now, assuming that general outlook and assuming that we are interested in seeing how present conditions or present theories as to international law may appear if looked at through a comparative microscope, as one might say, one of the interesting features in the history of law, of course, has been this effort in different ways and at different times to adapt a more or less apparently fixed system of legal institutions and ideas to new conditions.

In the Roman law it is true that from the time of the Twelve Tables—and perhaps even before that time—there was formal legislation. But it is also quite clear that for centuries legislation was an occasional interruption. In the ordinary development of law it took, one might say, the form of something like constitutional enactments. But I do not think it is fair to say that the so-called *leges*, the enactments of the Roman assemblies, constituted in the early period anything like the normal method of adapting existing ideas to new conditions. They served only to deal with certain very serious social problems; for example, acts or specific enactments of Roman assemblies were necessary to solve some of the questions that arose from disputes between the patricians and the plebeians. But the interesting thing is that at least during this whole period the Romans had a conception of the law of the Twelve Tables which is very similar to our conception of our own Constitution. It was something that, in a sense, was the foundation of their legal order.

The second point, which is very significant in that history, I think, was that there commenced approximately in the middle of the third century B. C.,

a very remarkable development of the law. I cannot go into that in detail, but in general this may be said. You may remember in that century Rome started on a career of conquest and the whole background, the whole economic environment of the legal program which had to be faced by Rome, changed with her contacts with the other countries of the Mediterranean. To meet those conditions, the Romans tried to do it first by appointing a new judicial magistrate who should hear cases between foreigners and between foreigners and Romans.

Chairman WILSON. If there is no objection, in view of the comprehensive nature of Professor Fenwick's question, I shall arbitrarily allow Professor Yntema three minutes more.

Professor YNTEMA. I do not want to get too far off, but it seems to me that this question of the analogy which has been suggested by Mr. Lauterpacht and of the method of adaptation leads us into the problem of how was it done?

What I am trying to get around to, as the Chairman very appropriately suggests, is that during that very formative period when the older system of remedies and actions was being reformed and the new formulary system was being introduced, and, through the formulary system, the basic ideas of law, the remedies, the general legal theories, were being readapted and modified to meet the changing conditions, the main method employed was the power of a magistrate to define what remedies there would be. That is the essential thing—the power of the magistrate, not a legislative power as such, but the power to deal with particular cases and prescribe remedies. The other thing that is interesting is that at the same time the Romans had the theory that the law remained as it was founded upon the Twelve Tables.

I believe the same process went on in the development of the English law. Again you had a legislative background in the thirteenth century, formed by a series of acts of considerable importance, some of them at least, these however being administered by the courts, and then the courts having to face the problem, in the growing rigidity of the system of remedies, of having to adapt them in a number of specific cases. The common law courts themselves to some extent stereotyped their system owing to a number of reasons which have never been quite satisfactorily explained. The adaptation of the common law was not sufficient, and the Chancellor in equity had to supplement it; the process was somewhat analogous to the Roman evolution, even in spite of the fact that the two systems of law and equity became separated.

It seems to me the main issue raised by this question of equitable jurisdiction is not whether you are going to have courts exercise the powers of judicial legislation, but rather whether you ought to adapt law in two sets of courts or by two sets of legal doctrines. My own feeling about that is that as soon as you envisage a duplication of jurisdictions or legal doctrines you are letting yourselves in for unnecessary complexities. If this be necessary, then

it is a necessary evil. But it does not seem to me that it is something that you should aim for.

Mr. BENJAMIN AKZIN. I find it rather difficult to understand how we can apply to international law the lessons which Professor Yntema has suggested as coming from Roman or English history. The growth of equitable jurisdiction, whether in its Roman form, in its English form, or in the form which it had taken in Europe in the nineteenth century, was based on a society which has one sovereign, one sovereign who may interfere with existing rights and legal relations and whose power to deal with such relations cannot be doubted nor questioned. It is this essential basis which is lacking in international law. If we apply the suggested procedure to international law, we will get new and radical departures at which people, who cannot even agree to new international legislation by consent, would certainly look in horror. If we agree to the development of international law by quasi-equitable proceedings, if we let courts go ahead and make new rules of law in the way in which the English Chancery courts were permitted to proceed a few centuries ago, we will get a growth of international law and of new binding rules of international law arrived at without the consent of the States concerned.

I am afraid that in this issue I shall have to take my stand with the conservatives. Indeed, the only conservative way of adding to the existing body of international law is by the process of changes rightly or wrongly called international legislation, namely, the process necessitating the consent of States.

I wonder whether those who advocate the growth of law by court action realize that if international tribunals should really take this step, we will get substantive rules which will not have received consideration by the States of the world, and that, faced with this threat, the States will be even less willing to submit their disputes to international tribunals than they are today.

Professor KENNETH COLEGROVE. The question of extending international law through equitable jurisdiction places a proper emphasis, I think, upon international law as a developing science. Why should we not resort to experimentation? Extending the equitable jurisdiction of the courts may, or may not, promote what we all desire, namely, the establishment of justice and the preservation of the peace. But we will not know its possibilities without trying it.

In this connection I wish to say that there is a tendency on the part of practicing lawyers to view international law within too narrow borders. International law, as a developing science, requires a broad basis. Parenthetically, I wish to say that the Program Committee, this year, should be congratulated upon introducing so many subjects bearing upon world politics, economics and psychology. We must not forget to face realities. Are we trying to apply rules of international law that are in conflict with natural laws? If so, so much the worse for the rules of law. Some twenty years ago, Mr. Chairman, I remember Professor George Grafton Wilson, in his classes

at Harvard University, in discussing a rule of international law, used to say: "Does this rule of law work? If it does not work, it has little value, and you will not long find it an actual rule." That is an excellent system to use with enthusiastic young men who think they can solve all of the problems of the world by means of the subject into which they have thrown themselves.

Too frequently jurists have lulled the world into a false sense of security by lip service to *pacta sunt servanda*. It is much better to discard the subtleties of the law, and to find out what political science, economics, psychology, anthropology and *geopolitik* have to offer on the causes and cures of war. Unhappily, they have all too little to offer. But, at least, today, these subjects approach the problem of world peace in more realistic fashion than does the science of law.

The events of the last three years should give pause to the jurist. What has become of that dearest of legal principles—the sanctity of treaties? When a great and civilized nation like Japan wants Manchuria, it breaks its solemn engagements and proceeds to take what it desires. When another great and civilized nation like Italy wants its "place in the sun" and a colonial empire, it forgets its treaty obligations, violates international law, and crushes Abyssinia. Italy has even dishonored her signature to the protocol of 1925 prohibiting asphyxiating gases.

If we apply the scientific method to the study of international relations, perhaps we can discover trends in human nature and in the behavior of States which may be set forth as natural laws. One trend, I think, would be this: a great and civilized State, no matter how much lip service has been paid to the sanctity of treaties and international law, when hard pressed, and when its rulers find that they have more to gain than to lose by a violation of treaties and international law, will disregard both law and pledges. Recognition of the existence of this natural law is not the counsel of despair. Far from it. The statesman will know that he will do better to seek the advice of the realistic scholar who attempts to discover the cause of war and the means of prevention, rather than to rely upon the jurist who simply insists upon a rule of man-made law which conflicts with a law of nature.

A MEMBER. I think I remember that Professor Wright mentioned the case of a Peruvian affair and a Bolivian affair, each of which occurred during the 1920's, when the Council of the League was persuaded not to take up the question of revision of treaties, partly, at least, upon the ground of arguments put forward by representatives of those nations that the Monroe Doctrine covered American affairs, and hence the League of Nations had no jurisdiction over those affairs, including the matter of revision of treaties.

Chairman WILSON. The Chairman does not care to enter into the discussion, but it would be interesting to compare the French and the English of that article of the Covenant and also to recall what it says in the Covenant. Somebody may query whether that is the object or was the original object of the Monroe Doctrine itself. I am not querying that; I am simply raising it

from an historical point of view. Then, to bring it down to date, there are some who think the Monroe Doctrine is absolutely superseded by a later type of attitude on our part towards the States to the south of us. That also might be a subject for discussion.

Professor JAMES W. GARNER. I had not intended to say anything, Mr. Chairman, but it seems if somebody does not keep this discussion going that we will have to adjourn pretty soon.

I am reminded of an invitation I had to speak one evening at a meeting at which there were to be four or five speakers, and the chairman came to me just before the meeting began and said, "Now, you must not speak longer than ten minutes." But as time passed the other speakers did not turn up, and he was very much embarrassed as to how he was going to keep the meeting going; so he came up to me and said, "I am very much in a dilemma here. It looks as if we are not going to have any other speakers. Would it be possible for you to hold out at least three-quarters of an hour to keep the meeting going?"

This matter of the Monroe Doctrine in the Covenant, to which reference was just made, has always interested me, and I never think of it that I do not regret that that reference to the Monroe Doctrine found its way into the Covenant. I never could see any reason for it. I think it is absolutely out of place, and I think President Wilson would never have insisted upon its being put in there if he had not been bombarded by cablegrams from the United States saying that the Covenant would not be acceptable unless it took care of this sacrosanct thing which we call the Monroe Doctrine. The other delegates consented to put it in under the understanding that it would be necessary to get the United States into the League of Nations; and they were so anxious to have us in that they were willing to put anything into the Covenant that we asked for. Well, we got it in and then refused to become a member of the League. So we are now in the happy position of being able to capitalize the value of the Monroe Doctrine in this reference in the Covenant, yet we are left free to interpret and apply it as we wish. I can readily understand the feeling among the other members of the League that that article ought to be amended out of the Covenant, as I think it should be.

Last night reference was made by Mr. Warren to the provision in the Neutrality Resolution of 1936 about the Monroe Doctrine. It has come to be almost a habit with us that we must get some reference to the Monroe Doctrine into our treaties. We got it into the Covenant, as I said; we got it into the Kellogg Arbitration Treaties; we got it by indirection into the Pan American Treaty of Arbitration. I suppose in time we will get it into the Thanksgiving proclamation, and perhaps in passports and naturalization certificates.

That provision in the Neutrality Resolution which exempts American Republics from the operation of an embargo is a most curious provision. Professedly the Neutrality Act of 1936 was intended to keep the United States out of war. But this provision to which I have referred is one which may

have the opposite effect. Let us take the case of a war between Venezuela and Great Britain. Suppose Venezuela is the aggressor upon British Guiana; and it is not impossible to imagine that. Under this provision of the Neutrality Act, the United States would be obliged to put an embargo on the shipment of arms to England but not put it on the shipment of arms to Venezuela. In other words, we would find ourselves in the curious position of helping the aggressor and discriminating against the victim. I felt last night like asking Mr. Warren if, in a case like that, Great Britain would not be justified in considering such action by the United States as unneutral and whether, therefore, Great Britain could not hold the United States responsible for engaging in unneutral discriminatory action. I think she would be. I think she would be quite within her rights in regarding such an embargo by the United States as an unfriendly act.

If that interpretation is correct—and I believe it is—that provision of the Neutrality Act does not promote peace; it does not tend to keep the United States out of war, but accentuates the likelihood that she will be drawn into the war. I hope, Mr. Chairman, if that law is revised at the next session of Congress, this most anomalous and indefensible article will be left out.

Mr. SANFORD SCHWARZ. It is hardly necessary for me to defend Professor Yntema or interpret him. As a matter of fact, his paper has been so illuminating that I think he can interpret my ideas much better than I can. But I would like to dwell for just a moment upon the alleged practical objection that has been raised to what he said.

In the first place, it is to be observed that all his discussion was centered on the proposition that we are going to have a scheme for the comprehensive settlement of international disputes. The judicial process is not one of leaping from the known into the dark, but it is the gradual advance from the known to the unknown.

There is also this to be said, that judicial legislation, so-called, does not by any means exclude other methods of establishing principles which are to govern relations of States or which are to govern any international order which may exist in the future. There is, I am afraid, a general tendency which, I think, is exemplified in what Mr. Colegrove had to say, to generalize the particular, as in the proposition that it is a fundamental law of jurisprudence that great States will inevitably do those things which they find to their advantage. Moreover, that does not appear to me to be a principle of jurisprudence. It may be true as a matter of simple fact, but, again, it may not. But it hardly constitutes a pertinent objection to the scheme of comprehensive settlement.

On the other hand, Mr. Colegrove's suggestion that we ought to proceed experimentally is a little difficult of application, because such experimental proceedings, at least in the past, have usually been by bilateral arrangements and have covered a very limited sphere. For example, we have a fair notion

of what claims commissions will do in adjusting disputes between States relating to international delinquencies which involve their nationals.

In that connection I should like to recall to mind the rather remarkable comment which was appended by the American Agent to the report of the Cayuga Claims Case. You will remember that in the convention of 1910 between Great Britain and the United States by which the claims of nationals were referred to an arbitral tribunal, it was provided that the principles which the commission was to apply were to be principles of international law, justice and equity. The tribunal which heard and decided the Cayuga Claims Case included as one of its members Dean Pound. And you will all remember that in that case an award was made in favor of Great Britain. A part of the argument, or part of the reasoning in the opinion, indicated that the tribunal was inclined to pierce the corporate veil. That was regarded by the American Agent as being a most extraordinary application of the principle of equity.

I have cited that as an indication of the fact that there is little to be feared in the way of radical legislation, little to be feared in the way of leaps into the dark on the part of arbitral tribunals. The nature of the problems which judicial tribunals can be called upon to decide are practically limited; it does not need limitations such as States commonly place in their treaties, limitations of vital interests or of domestic jurisdiction, and familiar things of that kind. Those represent not so much the fear that the questions likely to be referred are questions which a judicial tribunal could not decide, but rather those are questions which a State prefers not to submit to a judicial tribunal. I conceive that there is a difference between the question whether States should agree to submit all disputes which they may have with other States for judicial settlement, and the question whether the solutions which judicial tribunals are likely to arrive at if disputes are submitted to them will be satisfactory or not.

The second question is one to which the jurist can properly address himself, and it seems to me the discussion here should properly be limited to a discussion of that second question, not that the other one ought to be ignored, but that any confusion of the two must necessarily lead to invalid and unsound conclusions in both branches.

Professor JOHN B. WHITTON. I want to make one or two remarks which were inspired by yesterday's program. Professor Fenwick seemed to feel that there was very little connection between neutrality and peaceful change. It seems to me, however, that there is a direct connection between neutrality and peaceful change, and I simply want to reiterate the remark I made yesterday, that security will have to come before peaceful change, instead of the contrary. I think it is almost impossible to achieve "peaceful change" in the present poisoned atmosphere. After you have solved the problem of security or made some approach to it, then you can proceed to attack the problems of raw materials and the revision of treaties, and the other perplexing problems of peaceful change.

In this matter the responsibility of our country is very great indeed. In fact, it seems certain that there can be no peace without the participation of the United States in a system of international security, and surely that participation will be impossible so long as the United States maintains its present policy of neutrality. Above all, if we desire to keep out of war there is only one way, and that is to make war itself impossible.

Yesterday my good friend Professor Deák remarked that he found the problems of raw materials and markets extremely confusing. I agree with him heartily. There is no short cut to a mastery of that subject, particularly in such a short meeting. I think that our discussion has demonstrated that the problem is extremely complicated, and of this I am very glad because there is a real danger that the pacifists may come forward with another easy solution for peace, and there is none. We have already found out that peace cannot be achieved through a mere promise not to make war, and the unfortunate disillusionment which followed the discovery was inevitable.

Let us avoid further disillusionment. Let us be wary of this simple thesis of the "haves and have-nots," which implies that all we need do is to take away certain things from the "haves" and give them to the "have-nots" and then we will have peace. The problem is much more complicated than that.

I think this organization can do a great deal of good in proceeding to study many of the legal questions which underlie the problems of markets, raw materials and peaceful change; for example, the open door, commercial treaties, the most-favored-nation clause, and other matters which require further study. Some of these problems have scarcely been touched.

Professor Herbert Wright. One of the speakers last evening and this morning questioned whether a policy of neutrality on the part of the United States would tend to keep the United States out of war, and I desire to offer just one or two comments on that point.

I know of no divine commission or manifest destiny which would require the United States to maintain the peace of the entire world. I believe that, just as reformation of morals should begin with the individual person, so international peace should begin with the individual nation. The United States itself should keep out of war; and that would be one of the best contributions to the peace of the world. How can that be done?

First, by government control of the manufacture and sale of munitions, and embargoes on munitions to all belligerents. I think this has been taken care of by the Neutrality Act of August 31, 1935, as amended February 29, 1936.

Secondly, by an embargo on loans and credits to all belligerents. This has been taken care of in part by the Johnson Act of April 13, 1934, as well as by the two Neutrality Acts to which I have just referred. I will say that I agree with Mr. Warren last evening and Professor Garner this morning that the provision concerning the American nations in the last part of the amended

Act of last February is unfortunate and unnecessary. I also hope that it will be eliminated in any future continuation of neutrality legislation.

Thirdly, the United States should endeavor to settle all of its own disputes by amicable means. In this connection, I think the United States has an enviable record, one of which it may well be proud. It dates back to the Jay Treaty of 1794 and the Alabama Claims of 1872, and comes on up to the present, with one or two exceptions. At the present time the United States is a party to at least thirty-four bilateral arbitration agreements and at least thirty-eight bilateral conciliation agreements, as well as a party to many multilateral treaties, including the General Convention for Inter-American Conciliation of 1929, the General Treaty for Inter-American Arbitration of 1929, and the Anti-War Pact of Argentine initiative of 1934, not to mention, of course, The Hague Conventions of 1899 and 1907.

Fourthly, I think the United States can contribute to peace by removing the causes of any possible controversy that it might have with any other nation. In this connection, I think great work is being done at the present time by the reciprocal trade policy of Secretary Hull, of which agreements we now have about a dozen, the last being with Nicaragua, I believe. There may be, and probably will be, many individual items in the schedules of these treaties which should be subject to revision. That is to be expected. I think the policy in general is a step in the right direction.

Lastly, I would say that the United States should coöperate with other nations in all these matters to which I have just referred. That means coöperation with the League of Nations in these nonpolitical matters. I take it it is unnecessary at this late date to go into the question as to whether the United States should or should not enter the League. That seems to have been decided definitely some time ago.

So I think a policy of neutrality along the lines I have just mentioned is a surer, although not an absolute, guaranty to keep the United States out of war than participation in the attempted system of collective security, or, as my friend Dr. Pergler, of National University, would say, the system of "collective insecurity."

Mr. FRANCIS DEÁK. I am afraid I did not express myself very clearly yesterday. It seems to me that my remarks were misunderstood. My chief purpose, Mr. Chairman, in the two statements I made yesterday, was to give something in the nature of a warning. I do not claim credit for myself in taking that position, because, in all fairness, I have to confess that my skepticism about many of these matters is shared by others.

You pointed out to me very clearly many years ago, Mr. Chairman, when I had the privilege of being your student, that there is a great deal of difference between theory and practice. I am afraid that our generation is very much inclined to look at things in a very simple way. We have the example of this in Germany where everything is being reduced to the simple terms of race; and now in the United States we have another example in that all of the

problems of war and peace are sought to be reduced to the simple terms of collective security and neutrality. That is all I meant to say. And I think my friend, Professor Whitton, agrees with me, despite an apparent disagreement. I think my friend, Professor Fenwick, will agree with me that the world peace problem cannot be settled by the United States abandoning its neutrality and coöperating with the League of Nations.

Time and again in yesterday's discussion it was suggested that the United States should do this or that. Once the "aggressor" is determined, then we should immediately coöperate with the other nations and try to punish the aggressor. And we take it for granted that the aggressor can be determined immediately! I, for one, must confess that with the best will in the world, I do not see how that determination can take place. Today we may be willing to say that Japan is the aggressor, or that Italy is the aggressor, or that Germany is the aggressor, with the same ease by which we determined without the slightest hesitation that Germany alone was responsible for the World War. Yet, I do not believe that anybody here today would challenge my opinion that Germany was not the sole aggressor in 1914.

Professor ELLERY C. STOWELL. I do challenge it.

Mr. DEÁK. I am speechless, Professor Stowell.

Therefore, I believe that so far as we are concerned, if we approach the problem, being neither politicians nor statesmen, at least we have to be clear in our own minds that whatever we are going to do, we cannot under any single term of neutrality or population pressure solve this problem. Unless we realize the difficulty and the complexity of the task before us, I believe that we are not even going to start to do anything.

Chairman WILSON. Mr. Finch now has precedence by virtue of his official office.

Secretary FINCH. I do not wish to take advantage of that; but the time is growing short and we will have to bring this discussion to an end, and I would like to get into the record that I do not approve a great many things that have been stated here, especially some of the statements made last night.

I am a little surprised that the subject of neutrality as it appears on the program has been converted into a repetition of discussions which we have had in previous years, mainly taking the general form of criticism of our own Government,—and I think in most cases an unjust criticism of our Government—because of its policy. As I understood the subjects on the program, we accepted the continuance of neutrality and undertook to discuss its adjustment to world conditions. As Americans I think we have to take that point of view. We are insisting upon our neutrality in various ways and have recently emphasized that insistence by the passage of two laws in Congress on the subject.

I would be the last in the world to resent criticism of our own Government. I think we ought to have the fullest criticism. But I think it ought to be just criticism. I think that when we discuss the question of collective

security, for instance, we would better, if we wish to criticize our own Government in that regard, first state what other governments are actually doing to make the world collectively secure.

It should now be perfectly apparent to anybody who has not had a veil drawn over his eyes by excess advocacy of certain propaganda, that each government in the world is in favor of collective security for that particular government. But I do not know of any foreign government which is advocating collective security for the United States, either in its territorial domain or in its international debts. I do not know that international security extends to anything beyond territory,—I suppose it does not. Perhaps the United States does not need collective security, and maybe that is why we are not greatly interested in it. A similar reason seemed to control in the matter of the war debts. Europe wanted an all-around cancellation, but it happened that when the "all-around cancellation" reached the United States it stopped there and we could not pass the debt on to anybody else, except our own taxpayers.

If we would be fair, we should compare the policy of our own government with the policies of other governments, and not leave our lamentations resting entirely upon our own doorsteps.

We might point out what the United States did in Manchuria. The Government of the United States sent a note to the Japanese Government, taking a definite stand on the nonrecognition of territorial changes brought about by means contrary to treaties to which the United States is a party. I have not heard of any notes that other governments sent in support of Secretary of State Stimson. Subsequently the League of Nations Assembly adopted a resolution on the subject, but I understand now the League has interpreted its obligations so that the imposition of sanctions for enforcing the Covenant are not self-executory. The League can pass resolutions, but these need to be implemented by the independent actions of the nations agreeing to the resolutions. If we want to be fair concerning this episode, we should compare the individual action of the United States with the individual actions of other nations which acted under the aegis of the League of Nations.

I think we might also have a rather fair comparison in the matter of oil in the Italo-Ethiopian dispute. When Secretary of State Hull issued an appeal as strong as he could make it as an administrative officer to discourage the shipment of oil to Italy, the League promptly postponed the consideration of an oil embargo on Italy and has never seriously taken it up since. It left the administration in the United States out on a limb in that matter, and, in my opinion, this vacillation on the part of the League contributed heavily to the defeat of the provision in the subsequent United States neutrality law to authorize an embargo on raw materials essential in war.

I think there has also been confusion between the international coöperation of the United States and international collective action for security. There were some statements indicating that the United States has been incon-

sistent in different parts of the world in this regard. I do not think we have been inconsistent. We have coöperated internationally all over the world. However, it has been a consistent policy of the Government not to engage in collective, joint action. I think we can explain the seeming variation in our attitudes on different continents if we understand the distinction between those two matters of policy of our Government.

Now, as to the Monroe Doctrine. Personally I do not have the slightest objection to the provision in our neutrality law which becomes applicable in case of a war on this hemisphere. It is simply a reciprocation of what the South American nations did when we entered the World War. They did not qualm over questions of technical violation of neutrality. They simply said "On this continent we are all brothers, and we shall forget about questions of neutrality and our efforts will go along with the United States to help her carry on the great contest in which she is engaged." In my humble judgment, the Monroe Doctrine has been one of the greatest factors for preserving peace in the Americas, and everything we can do to strengthen it in that regard should be encouraged and not deprecated.

Professor STOWELL. There has been a great deal of talk about aggression since the Treaty of Versailles and about the question of whether Germany was or was not the aggressor. There now seems to be a trend to recognize that she was not. Everybody used to say that she was. I think, after all, the question comes back to a definition. For our purposes the question of whether a country is or is not the aggressor depends upon whether it violates international law in such a way that it assumes responsibility for what happens. The usual procedure of settling international differences is through conferences. And when Germany broke away from that principle and declared that she would not enter a conference with the other Powers, she disregarded the generally accepted procedure for the settlement of international differences. Therefore she was the country mainly responsible. You cannot hold Austria-Hungary responsible. They were in a situation in which any country would have been unreasonable. But Germany, as a less implicated and less concerned country, should have exercised some restraining influence. And in the last few moments, when it was too late, they did show that spirit. But I think when they refused to take part in a conference they assumed before the whole world responsibility for what happened. Therefore, relatively speaking, they are to be considered as the aggressors.

We have all been aggressors in the past. Why not forget it and go on to the next problem? I am not interested in the question of Germany as an aggressor, but I am interested in what Germany is today. It seems to me when Germany throws over a specific provision to which she agreed in the Locarno Treaty, and instead of entering into a conciliatory discussion as to modifying her status, jumps in and disregards an express provision of the treaty, that she is doing the same thing and that she is again the aggressor. She dares to imperil the whole peace of the world and civilization in order that

she may snatch a temporary advantage. Therefore, again I think she is to be considered in this last situation also as the aggressor.

I regret very much that England did not immediately side with France in supporting her. Then we would have had collective action in support of a recognized principle of international law. But what is the use of going on to that old question of aggression? We want to go on to the constructive part of international relations. Let the dead past bury its dead and go on to what is new and full of promise.

Mr. NORMAN J. PADELFORD. I rise to make one observation and to relieve myself of one remark. It seems to me, as I have been listening to the discussions, that our discussions, particularly this year, have been along the lines of what national policy should be. I had supposed, Mr. Chairman, that we were a Society of International Law and that our object was to discuss what the law is. It seems to me we are discussing what should or should not be the policy of our Government, which certainly has not yet evolved into a situation of law. In another year I think it might be well for us to confine our remarks a little more to the perhaps less flashy questions of law and devote less time to questions of national policy.

I was very much interested the other evening, Mr. Chairman, to your reference to the United States in international law. But you did not take account of a statement of a rather famous resident of this section of Washington which was made some years ago. A certain gentleman said, "I have established a new principle of international law." He referred to the nonrecognition of acts accomplished by force. That statement or assertion was supported by reference to the fact that the League of Nations had condemned certain actions and said it would not recognize acts accomplished by force. It seems that during the last two years, whether that was or was not a principle of international law, it has not been adopted.

The United States has made no protest against the German action in the Rhineland, and it would seem, at least, that that action was accomplished by an attendant display of force. Furthermore, it is worthy of note that the assertion that acts should not be accomplished by force found expression in the Argentine Anti-War Treaty, to which, significantly enough, Italy has become a signatory.

The United States did not oppose the action of Italy in Ethiopia. We asserted our neutrality and put our new neutrality law into effect; but we did not say that Italy was violating international law by trying to accomplish by force territorial changes in Ethiopia. Therefore, it would appear that this assertion of a new principle of law which was made a few blocks away from us two or three years ago has not yet found acceptance as international law, even by the United States.

Professor CLYDE EAGLETON. I have had some feeling of responsibility as a member of the Program Committee for imposing such a subject upon the Society, but not from the viewpoint that was just expressed. It seems

to me that the worst defect that international law has and has had for a long time, is its inability to grow. If international law wishes to become stronger and more useful in the world, then it must find a means of change; and I do not know any organization better fitted to make such a study than a Society of International Law. From that viewpoint I think we are quite justified in saying that there is nothing more important for the Society to study.

What has been weighing on my mind about this subject is that term "peaceful" or "peaceful change." I am not sure but that we should have said "desirable change," or something like that. If anyone interprets it to mean that we should remove the causes of war and thereby get change, I am afraid that is no answer. I am pretty well convinced that you cannot get the change that we need without, in the first place, a collective agreement, which implies collective organization and in the second place, a physical force sufficiently strong to compel the change. Therefore, I doubt whether we should have used the term "peaceful." The question is rather, How can you get change without the consent of the signatories, or without the consent of those who have a legal right which works unjustly?

To my mind there is a connection with neutrality, although perhaps it might be a negative connection; that is, we cannot get this change we need, the revision of the Treaty of Versailles, or whatever you want to study, except by agreement of the community and enforcement by the community. And that implies an abandonment of the principle of neutrality. In other words, to put it succinctly, so long as we maintain the principle of neutrality we will never be able to get the change that we need.

Chairman WILSON. We have two minutes remaining. Is there anyone who wishes to speak who has not spoken already? If not, Mr. Whitton has the floor.

Professor WHITTON. My friend, Mr. Deák, has implied that there is no short-cut to peace. With this I fully agree. And I agree with him also that the mere participation of the United States in a system of international security will not secure peace. Furthermore, we would be utterly devoid of a sense of proportion if we thought that merely by doing something on this continent we would bring peace to the entire world. The matter is much more complicated than that. We merely maintain that a reasonable contribution on the part of the United States is indispensable.

In regard to the questions of international security, something new has happened this last year which should be recorded. At our meetings during the last eight or ten years, the same arguments against the participation of the United States in a system of security have been heard repeatedly. It has been claimed, first of all, that it would be impossible to determine the aggressor, or at least to do so in time. This past year the League of Nations has proved that it is possible to determine the aggressor, and to do so promptly.

Another difficulty which has been emphasized is that there are certain vital defects in the Pact of Paris, particularly the absence of any definition of the term "war." Yet the League of Nations has succeeded in declaring that a certain situation actually was war. It seems to me that this, too, constitutes progress.

The third point is that for the first time the League of Nations really applied sanctions. The opponents of collective security have always said, first, that the League of Nations could not determine the aggressor and, secondly, that if it did, it would never apply sanctions. But this year this has been done. And many nations have coöperated at a great sacrifice because they believed in the cause of international security.

BUSINESS MEETING

Chairman WILSON. The Society will now proceed to the business we have before us.

Mr. CHARLES HENRY BUTLER. I wish to call the attention of the members of the Society who are present to the list of officers and committees shown in the program. There they will see two of the names have stars placed before them.

Our Vice President, George W. Wickersham, and a member of our Executive Committee, George T. Weitzel, have both passed away since our last meeting. Both of these gentlemen were very much interested in the work of the Society and rendered valuable services to it. They will be greatly missed.

I now move, Mr. Chairman, that by a rising vote we express our sorrow at their passing and our appreciation of the services they have rendered, and that the Secretary make the proper minutes on the records of the Society and transmit copies of them to the families of the deceased.

(Motion seconded.)

Chairman WILSON. All in favor will signify by rising. (After a pause.) It is unanimous.

Anyone who has known either of these gentlemen will be glad to add his tribute to this memorial.

REPORT OF THE COMMITTEE ON CODIFICATION

Chairman WILSON. The first item on our business program is the report of the Committee on Codification of International Law. Professor Reeves was chairman of that committee, but he is at Brussels and he asked me to make a brief report for him. The report which I wish to make is as follows:

Already a large amount of material on codification has been gathered and has been put into the form of code. At present there is a study going on under the Harvard Law School Research in International Law, which has carried on these studies, and I think all of the members of this particular Committee on Codification are on the Advisory Council of that body.

Mr. Wickersham was the chairman of that Research Committee, as he was also the expert appointed by the League of Nations from the United States.

One of the reasons this committee has not done very much with it in the American Society of International Law was because the Society did not have any money. The Law School Research has for the next two and a half years money ample for the carrying on of the work. You have received during the last two years several supplements published by the *American Journal of International Law* through the generosity of the Carnegie Endowment, which contain the reports of this codification. The support of the Carnegie Endowment has been very liberal in that matter. The carrying on in the earlier stages was from money from various foundations. The money at the present time is being furnished by the Bureau of International Research of Harvard University and Radcliffe College. Three of our members are conducting this research—Dean Dickinson, of the University of California, on the question of Recognition, Professor James G. Rogers, of Yale University, on Judicial Assistance, and Professor Jessup, of Columbia University, on Neutrality. These researches are all in progress.

Let me say incidentally that I am very happy to report that Mr. Jessup, whose condition was quite serious, is very much improved. That is certainly cheering to all of us who have missed him at this meeting.

Secretary FINCH. Will you permit an interruption at this point which your remarks suggest to me?

Mr. Jessup was chairman of the committee that arranged this program. And I think it would be very appropriate for the Society to send a telegram to him expressing our hopes for a speedy recovery.

Chairman WILSON. I think everybody would be in accord with that. I take it that that suggestion meets with unanimous approval. The telegram will be sent.

Let me say that if there are any questions with regard to codification, I will be glad to answer them, in the absence of Professor Hudson, who is also in Europe for another purpose. I have been entrusted with the duty of answering questions in regard to codification.

The next item on the program is the Report of the Committee on Publications of the Department of State. The Chair will recognize Professor Herbert Wright.

REPORT OF COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE

Professor HERBERT WRIGHT. The list of members of the Committee on Publications of the Department of State will be found on the last page of the program. I might say the chairman of the committee has kept in touch with the matter of the estimates for Department of State publications from the time they originated in the Department, through the Bureau of the Budget, through the House Subcommittee on Appropriations and through the Senate.

The bill containing this appropriation has passed the House and has passed the Senate, and it is only because of some amendments in other portions that there was a necessity of going to conference. I have no doubt that it will ultimately pass.

The testimony before the House Subcommittee on Appropriations was so complete, by Mr. Carr, Dr. Wynne and Mr. Hunter Miller, that the House cut off practically nothing—a mere matter of $3,000, which will not interfere at all with our program. I might say also with some pardonable pride that the House Committee thought well enough of the report [1] that was rendered last year by this committee that they have republished in the hearings the complete report. I think it was the first time that that has happened. The chairman of your committee suggested to the officials of the State Department that it might be desirable to have the testimony before this committee, which was so complete, reprinted in pamphlet form, which has been done.[2] I had a few copies of the pamphlet here at the first meeting Thursday night for distribution; additional copies may be secured from the Department.

The amount granted, $150,000, is twenty-five per cent. more than last year which, in turn, was twenty-five per cent. more than the preceding year. So there will soon be available ample funds to take care of the projects before the Department, the *Foreign Relations* particularly and the Miller Treaty volumes.

The Department contemplates during the next fiscal year issuing another publication, the Lansing Papers, in perhaps two volumes. When Mr. Lansing left the Department he took with him his personal memoranda and the official documents in which he took a direct personal rôle. But two or three years ago his estate returned those to the Department and they are now being made ready for publication.

The Department has also made efforts as recently as this month to secure a publication long advocated by Professor Hudson, Professor Jessup and many other members of the Society, the documents concerning the Peace Conference. Because of the fact that these documents would be considered incomplete without the minutes of the Council of Four, the Department is attempting to secure the consents of the interested governments in connection with some of the documents contained in these minutes. There is some opposition, however, on the part of at least one powerful government, but it is hoped that this may be eventually overcome. If so, there will be several volumes of these that will appear.

Your committee is also recommending that a combined index of the *Foreign Relations* volumes published since the last index volume (1861–1899) was issued, be taken up as a project for next year.

A more complete report was made to the Executive Council Thursday,

[1] *Proceedings* of this Society, 29th Meeting (1935), pp. 199–209.

[2] *Status of the Foreign Relations and the Miller Treaty Volumes* (Publication No. 864).

with the recommendation that, if adopted by the Executive Council, it be published in full in the *Proceedings* this year, and also that this committee, or another committee like it, be appointed for next year, both of which recommendations were adopted by the Executive Council.

As chairman, I wish publicly to express my appreciation to the other members of the committee for their coöperation and the suggestions they have made from time to time, and their availability whenever needed in order to further the work of the committee.

I have just one more item to call attention to, and that is in connection with a Special Committee on Documentation of Pan American Conferences that was created last year but is no longer in existence. This was created, due to the initiative of Professor Jessup and others who tried to secure a little more standardization in the publication of Pan American Conference proceedings. That committee made a report, which also appears in the *Proceedings* for last year.[3] Copies of this report were run off and made available to Dr. Rowe, Director General of the Pan American Union, who has taken care to see that they will be brought to the attention of future Pan American conferences. I have recently received a letter from Dr. Rowe, in which he says:

> My dear Dr. Wright:
>
> With reference to our recent conversation and the report submitted by your committee on the standardization of reports and documents of Pan American Conferences, I beg to say that since the receipt of your report the Pan American Union has followed the practice of communicating with the secretary general of Pan American Conferences recommending that the documentary material of the Conferences conform to the specifications set forth in your report.
>
> It is also proposed that at the Eighth International Conference of American States this matter will be submitted for consideration and a formal expression of the Conference obtained with respect thereto.
>
> I beg to remain, my dear Dr. Wright,
>
> Most sincerely yours,
>
> L. S. Rowe
> *Director General*

This letter speaks for itself.

Chairman Wilson. You propose two motions, I believe.

Professor Herbert Wright. I move that a more extended report, similar to the one of last year which was found so effective in helping to secure the appropriation for the Department this year, be printed in full in the *Proceedings*.[4]

(The motion was duly seconded and carried.)

Professor Herbert Wright. The second motion is that this committee or a similar committee be appointed for the next year.

(The motion was seconded and carried.)

[3] *Proceedings* of this Society, 29th Meeting (1935), pp. 210–214.

[4] Printed herein, *post*, p. 234.

Chairman WILSON. The next item on the program is the report of the Committee on Honorary Members, of which Professor Garner is chairman.

REPORT OF THE COMMITTEE ON HONORARY MEMBERS

Professor JAMES W. GARNER. I might say for the information of some of you that we have nine honorary members of the American Society of International Law. During the past year two of our honorary members have died. They were Judge Adatci of Japan, and Professor Charles Lyon-Caen of France.

After considering the matter very carefully, the committee came to the conclusion that there is no particular reason why any new honorary members should be elected this year. I think the Society has always regarded the position of honorary member as one of particular honor. The honor has been bestowed rather sparingly and only when there seemed to be some outstanding man who merited the honor has the Society bestowed it. The committee feels this year that there is no particular reason why we should elect a new member. Last year we elected Sir John Fischer Williams, of England, and the year before that Judge Van Eysinga, of the Netherlands. Perhaps sometime we might elect another Japanese member to take the place of Judge Adatci; but there seems to be no Japanese scholar in this field at the present time upon whom we might be justified in bestowing the honor. So the committee was disinclined to make a recommendation for the election of any new member this year.

The report was approved by the Executive Council the other day. Of course, there is no reason why the Society should not decide otherwise, if it wishes to do so. At any rate, that is the feeling of the committee.

Chairman WILSON. What action do you desire to take on this report?

Mr. BUTLER. I move that the report be received and filed.

(The motion was duly seconded and carried.)

Chairman WILSON. Let me say to you that if any of you care for a fine memorial in regard to the life and service of Judge Adatci, if you will just let me have your address I will see that it is sent to you.

Mr. WILLIAM C. DENNIS. Mr. Chairman, this is a little out of order, but I intended to rise on the report of the Publications Committee to say that there is one member of the committee who has done most of the work. All I personally had to do was to sign my name to a most admirable report which was written by him. I want to express appreciation of the very able work that the chairman of the committee has done.

Chairman WILSON. I think we all agree to that.

The next item of business is the election of officers.

REPORT OF COMMITTEE ON NOMINATIONS

Professor CHARLES E. MARTIN. I am the chairman of the Committee on Nominations by default, since most of the other members of the committee could not be present this morning.

We have to report the following nominations.

For Honorary President: Mr. Elihu Root.

For President: Dr. James Brown Scott.

For Honorary Vice Presidents: Newton D. Baker, Philip Marshall Brown, Charles Henry Butler, Frederic R. Coudert, James W. Garner, Manley O. Hudson, Charles Evans Hughes, Cordell Hull, John Bassett Moore, Jackson H. Ralston, Leo S. Rowe, Henry L. Stimson, Charles Warren, George Grafton Wilson.

For Vice Presidents: Chandler P. Anderson, Jesse S. Reeves, Elbert D. Thomas.

In the recommendations for the Executive Council for the year ending 1939 we had in mind a distribution of representation from the Department of State, from the legal profession, and from the universities, and also a certain geographical distribution as well.

These are the nominations: Charles G. Fenwick, Francis C. deWolf, W. R. Vallance, Herbert Wright, Robert R. Wilson, H. M. Colvin, E. D. Dickinson, and Howard LeRoy.

For the Executive Council to serve until 1938, in place of Senator Thomas, who is nominated for Vice President: Frederick A. Middlebush, President of the University of Missouri.

ELECTION OF OFFICERS

(Professor MARTIN now presiding.)

Chairman MARTIN. Such are the recommendations of the committee.

Mr. DENNIS. I move that the nominations be closed and that the Secretary cast the unanimous ballot of the Society for the gentlemen recommended by the Committee on Nominations.

(The motion was duly seconded and carried.)

Secretary FINCH. The Secretary has cast the ballot as directed.

Chairman MARTIN. The respective nominees have been duly elected to the offices for which they were recommended.

(Professor George Grafton Wilson resumed the Chair.)

Chairman WILSON. Allow me to thank you for the honor.

MISCELLANEOUS BUSINESS

Chairman WILSON. We now come to miscellaneous business. Has any member of the Society any item of business which he would like to bring up?

Secretary FINCH. I would like to make a statement which I think the members of the Society who have not already heard it as members of the Council will be interested in hearing.

We have been planning for several years to issue another cumulative index to the *American Journal of International Law*, including the supplements and the *Proceedings* of these annual meetings; and I am now happy to say that the Society is in position to proceed with that work. In 1920 we

published an index to Volumes I to XIV inclusive. The new index will include Volumes XV to XXX, that is, from 1921 to the end of 1936.

I should state that the funds to make this possible have been provided by the Carnegie Endowment for International Peace. It is a very expensive printing job, and the Society does not have funds of its own to do it. On both occasions when we found it necessary to have an implementing volume of this kind the Carnegie Endowment has been good enough to help us out. I hope that by this time next year all of you who take the *Journal* will have in your hands a copy of the new cumulative index. It will be sold, as the Society is required to sell all of its publications, at a nominal price, of which you will be notified in due time.

Professor CHARLES G. FENWICK. I would like to move an expression of thanks on the part of the Society to the Carnegie Endowment for its contribution to this good work.

(The motion was duly seconded and carried unanimously.)

Chairman WILSON. Is there any other item of business? Someone might wish to discuss the types of questions which should be considered at the next annual meeting. Some query has come to the Chairman in regard to making the program more strictly legal. The exact expression was "not to resolve the American Society of International Law in any respect into a meeting of the Foreign Policy Association," suggesting that it would be rather unfair at our age of thirty years to be taking up the work of a younger association. To the Chairman have come several letters and several comments to that effect. That being the case, the next committee on program may consider that proposition or that suggestion.

Mr. BUTLER. I move that those communications be referred to the Secretary, to be transmitted to the Program Committee when such committee is appointed.

Chairman WILSON. He will take note of that.

Professor GARNER. Mr. Chairman, has the Committee on Program this year been chosen?

Chairman WILSON. The Council does that.

Professor GARNER. It was formerly a custom of this Society for the Program Committee to invite suggestions from members of the Society in regard to suitable programs. I recall that I was called upon every year by the chairman to make suggestions, and I took the invitation rather seriously. If I am correct, in late years there has been no disposition to do that. I do not know to what extent the program is worked out by one man, but I still feel that suggestions of this kind coming from members of the Society might be very helpful to the committee and might enable us to get better programs. I know that for the last fifteen or twenty years there has been some criticism in the Society about the character of our programs. They have been better some years than others. But, frankly, I think that oftentimes they have been rather poor.

Secretary FINCH. I am not the chairman of the Committee on Program, so I cannot answer for his policy. However, I will say that in the January number of the *American Journal of International Law* I inserted a notice, as Secretary of the Society, in regard to the annual meeting in which I gave the name and the address of the chairman and invited any member of the Society who had any suggestion to make to write to Mr. Jessup. Whether he has also personally invited suggestions I do not know. But certainly every member of the Society had an invitation to do the very thing Professor Garner suggests.

Chairman WILSON. The moral is to read the *Journal*.

Professor MARTIN. A few years ago were not the rules of the Society amended so as to include questions of policy as well as questions of law?

Chairman WILSON. That you will find printed on the front page of the program.

Is there any other matter which should come before this meeting? If not, the meeting will be adjourned. It is now 11:59 a. m., and the Executive Council is to assemble at twelve o'clock. That includes all of the newly elected members. So we seem to be running fairly close to schedule.

(The meeting adjourned at 11:59 o'clock a. m.)

ANNUAL BANQUET

THE CARLTON HOTEL

Saturday, April 25, 1936, 8 o'clock p. m.

TOASTMASTER

DR. GEORGE GRAFTON WILSON, *Professor of International Law, Harvard University*

SPEAKERS

The Honorable SEÑOR DON MIGUEL LÓPEZ PUMAREJO, *Minister of Colombia*
The Honorable GEORGE S. MESSERSMITH, *American Minister to Austria*
Rev. EDMUND A. WALSH, S. J., *Regent of the Georgetown School of Foreign Service*
The Honorable ELBERT D. THOMAS, *United States Senator from Utah*

MEMBERS AND GUESTS

Phya Abhibal Rajamaitri, *Minister of Siam*, and Madame Abhibal Rajamaitri
Eleanor Wyllys Allen
Mohamed Amine Youssef, *Minister of Egypt*
Mrs. Fannie Fern Andrews
Pedro Manuel Arcaya
Albert W. Atwood
John W. Bailey, Jr.
Margery Bensen
Alfred Bilmanis, *Minister of Latvia*
Carlos Blanco, *First Secretary, Cuban Embassy*
W. Boström, *Minister of Sweden*, and Madame Boström
Mr. and Mrs. Charles J. Brandt
Charles Henry Butler
Mr. and Mrs. Louis G. Caldwell
Henry M. Campbell
Mr. and Mrs. Mitchell B. Carroll
Francisco Castillo Nájera, *Ambassador of Mexico*, and Señora de Castillo Nájera
Hector David Castro, *Minister of El Salvador*, and Señora de Castro
Kenneth Colegrove
Mr. and Mrs. H. Milton Colvin
Wade H. Cooper
Henri De Bayle, *Chargé d'Affaires ad interim of Nicaragua*, and Señora de De Bayle
Clarence W. DeKnight
Yvonne Dervilers
John Dickinson
Edward Dumbauld
Clyde Eagleton
Pearle Edwards
Mr. and Mrs. Lawrence D. Egbert
Mehmet Münir Ertegün, *Ambassador of Turkey*
Ray Farrell
Eleanor H. Finch
Mr. and Mrs. George A. Finch
Richard W. Flournoy
Roger Gaucheron, *First Secretary, French Embassy*
Mr. and Mrs. R. L. Golze

Mrs. Joseph D. Grigsby
Franklin Mott Gunther
Mrs. Marie D. Harry
Rev. Oliver J. Hart
Mr. and Mrs. Thomas H. Healy
Miss P. Hunt
Thorsten Kalijarvi
Allen T. Klots
Faik Konitza, *Minister of Albania*
Donald E. Van Koughnet
Herbert S. Little
Julio Lozano, *Minister of Honduras*, and Señora de Lozano
Hans Luther, *Ambassador of Germany*
Mrs. Monica Markey Magrane
Theodore Marburg
Charles E. Martin
Fenton R. McCreery
Louis W. McKernan
Mr. and Mrs. William McNeir
Creston B. Mullins
Mr. and Mrs. James Oliver Murdock
Mr. and Mrs. Harold H. Neff
Josef Nemecek, *Counselor of Czechoslovak Legation*
Edmund L. Palmieri
Lt. Col. and Mrs. Robert P. Parrott
Andrés Pastoriza, *Minister of the Dominican Republic*, and Señora de Pastoriza
Robert Perret
Mr. and Mrs. D. Roland Potter
Mr. and Mrs. William Jennings Price
Adrian Recinos, *Minister of Guatemala*, and Señora de Recinos
Harold G. Reuschlein
Miss M. V. Reynolds
J. Richling, *Minister of Uruguay*
Admiral William L. Rodgers
Albert A. Roden
Mrs. Amanda Schlesinger
Mr. and Mrs. Edwin Schoenrich
Otto Schoenrich
Mrs. Ruth B. Shipley
Mr. and Mrs. Theodore Simonton
Wladyslaw Sokolowski, *Chargé d'Affaires ad interim of Poland*, and Madame Sokolowska
Ellery C. Stowell
Major and Mrs. Wallace Streater
Sao-Ke Alfred Sze, *Ambassador of China*
Senator and Mrs. Elbert D. Thomas
Abram H. Tillman
Alexander Antonovich Troyanovsky, *Ambassador of U. S. S. R.*
William R. Vallance
Mr. and Mrs. John T. Vance
Marjorie M. Whiteman
Mr. and Mrs. Brayton F. Wilson
Mr. and Mrs. Robert R. Wilson
Francis Colt de Wolf
Herbert Wright
Georg Wunderlich
Cyril Wynne
J. Edwin Young
Povilas Zadeikis, *Minister of Lithuania*, and Mrs. Zadeikis
Ivan Zlatin, *Chargé d'Affaires ad interim of Bulgaria*

Rev. OLIVER J. HART, Rector of St. John's Episcopal Church, Washington, D. C., offered the invocation.

AFTER DINNER

The speaking began at 9:15 o'clock p. m.

The TOASTMASTER. At this closing meeting of the American Society of International Law I first wish to read a letter from the White House, dated

March 13, 1936, addressed to our President, who is at present in Brussels. (Reading):

THE WHITE HOUSE
WASHINGTON

March 16, 1936

My dear Mr. Scott:

Thank you very much for your kind letter of March eleventh inviting me to be a guest at the banquet of the American Society of International Law when it holds its thirtieth annual meeting in Washington April twenty-third to twenty-fifth.

I do want you to know how sorry I am that it will not be possible for me to be with you and your fellow members on this occasion. I shall appreciate it if you will extend to them my sincere greetings and best wishes for a successful meeting.

Very sincerely yours,

(Signed) Franklin D. Roosevelt

The wishes of the President certainly have been realized, and the meeting has been very successful. This evening we are to crown the success through the assistance of our guests.

As I looked over the list which was brought me, I was rather pleased to find that all of the speakers had had more or less to do with educational work. They show what a good basis there is in training for teaching, for going on into very practical lines. The lines into which they have gone are quite unlike. Those who are our younger students and colleagues who have been with us in such large numbers the past week, from seeing what these gentlemen do who are about to speak to you, will be able to judge what their future should be.

When I was drafted into the service of presiding this evening I was told that the names on the list below my own were the ones who were to make the speeches. That being the case—and that was quite emphatically stated to me—I am going to proceed to follow the orders which I received.

The first speaker of the evening is one we are very delighted to welcome, who was educated in part in the United States and now returns to honor his country and ours.

I have the pleasure of introducing His Excellency, the Minister of Colombia.

Señor Don MIGUEL LÓPEZ PUMAREJO. Mr. Chairman, ladies and gentlemen: First of all, I wish to take the opportunity of thanking the American Society of International Law for the honor of addressing this meeting. I can say without false modesty that I do not see anything in my past performance to justify that invitation. I hope that you will all agree with me as to the advisability of divesting myself of my diplomatic position in order to be able to speak more heart to heart to all of you tonight. Otherwise, it might be a little more embarrassing to me and it might restrict the nature of the conversation, and, perhaps, the very ends that the Society has in mind when it asks foreign representatives to come and speak their minds.

THE PARADOXES OF PEACE AND THE COMING PAN AMERICAN CONFERENCE

By The Honorable Señor Don Miguel López Pumarejo

Minister of Colombia

We live in an age of paradoxes. In the social and economic field we have insecurity and poverty in the midst of plenty. In the field of international relations we possess the most elaborate peace machinery in all history and yet peace was seldom in a more precarious position. What is most alarming is that mankind apparently has become discouraged, disillusioned and cynical about the entire matter. Faith in social justice and economic freedom and in international law and the instrumentalities of peace is indeed at a low ebb. Before faith is completely lost (for then it may be too late) it behooves those who are in a commanding and contributing position to do all they possibly can to give humanity the social security and the peace that it wants.

While the search for a complete solution is impeded by almost countless obstacles, surely each one of us ought to be able to find an individual explanation of the paradox. And a collective understanding of the explanation may in itself contribute towards advancing at least a partial solution of the world's present difficulties.

International affairs concern human beings and are administered by them. Human nature is essentially a great variable. It has an important characteristic which is all too frequently overlooked. Namely, human beings, more often than not, are controlled by emotions and opinions rather than by demonstrable logic. Too much of the elaborate peace machinery of the world has failed lamentably because it is based on impeccable logic, while ignoring emotions and opinions which often have little to do with logic. Too much stress has been placed on facts and too little on opinions. Paradoxical though it be, opinions are more important in international affairs, because nations act in accordance with opinions, regardless of whether or not they square with facts. The ultimate goal towards which we should all strive is obviously the squaring of logic, opinions and actions.

It is dangerous to assume, as some may do, that the problem is a new one. The world has now before it some two hundred peace plans, some of them centuries old. Innumerable attempts have been made to put these plans into practical operation through organizations and pacts. The lack of a satisfactory solution is certainly not due to a lack of treaties. We have been told that the international relations of the world today alone are regulated by no less than 25,000 signed treaties.

This tremendous mass of recorded testimony may be a tribute to the untiring efforts of high-minded statesmen, but the present trends of international relations raise doubts as to their efficacy and the underlying motives and principles that have prevailed in the making of treaties in the past. It

would be interesting to have exact information on the number of treaties that have been entered into spontaneously by the parties concerned, with their rights mutually respected on a footing of equality; the number that have been signed under pressure or duress; the number that have been broken, and the number that have been signed as an expediency, with mental reservations on their observance. The exact information, however, is not indispensable to reach the conclusion that it is not the quantitative approach of treaties that is needed to establish peace and friendliness in international relations, but rather the qualitative concept. We do not need many more treaties, we need better treaties, good treaties, treaties signed in good faith, treaties that can be and are faithfully executed and observed. We need right, justice and honor to prevail in treaty-making and execution. We need to reëstablish the significance of the sanctity of treaties, so that mankind may have faith and find a reasonable measure of peace in international obligations. For the smoke-screen of specious international good will and friendship, based largely on empty words, should be substituted by real good will characterized by diaphanous sincerity.

In our every day life we are always ready to discard obsolete articles of domestic or personal use and to replace them by newer models that render better service and provide greater satisfaction and comfort. If the article is of certain value we endeavor to realize on the old one and to replace it by a new one that we generally purchase on the installment plan. Frequently an automobile agent will take in two or three old cars in order to accommodate his customer with the best available model. And I ask, has not the time arrived when we can trade in some of the inefficient, unworkable treaties for a few new ones that may render better service and satisfaction? Should we not adopt the installment plan in the international peace machinery and work step by step towards the fulfillment of the goal we are all longing for, rather than committing ourselves to a ready cash all-inclusive panacea that we know we cannot live up to?

In my humble opinion, international relations will be improved when we adopt the policy of signing new treaties only when the following factors are present: (1) Equality of rights, that is equality before the law, international law, regardless of power, economic or military. (2) There should be practical mutual interests advanced by the treaty. (3) The treaty should not imply or promise anything that is either impossible or unreasonable. (4) We should examine carefully in advance what the treaty may cost us, should a contribution of one sort or another be contemplated, and be willing and prepared to pay the price. (5) Its terms must be stated completely in simple, unequivocal language.

If all these factors are not present in practical form, treaties offer little hope of promoting better international relations in a practical way. They will be a snare and a delusion and actually damage international relations and the spirit of world peace.

I cannot refrain from laying great stress on the requirement that successful treaties must be written in clear, unequivocable language. The path of peace during the past decade has been strewn with the wreckage of solemn agreements which superficially promised much, but which, through their evasive language and broad reservations, developed into so many scraps of paper. If nations, in good faith, intend to agree to do a specified thing and sign a treaty with this end in view, why is it necessary to make simultaneously numerous exchanges of notes of an interpretative character? Why cannot the entire agreement be stated in simple, clear-cut language in the treaty itself, making that document a complete instrument in itself? Why enter into an imposing agreement to do a general thing and then by means of notes emasculate or nullify the agreement completely? Students might well question whether there is real good faith in entering into such agreement. They might well doubt whether the prime purpose is not camouflage and political expediency.

There are numerous recent examples of imposing treaties nullified by interpretations or reservations. While I have no intention of casting any aspersions on the Kellogg-Briand Pact, I fear that it is a good example of this point. The Pact on its face seems to be a general renunciation of war. The interpretative notes, which are an essential and binding part of the entire arrangement, come close to completely nullifying the general purpose so solemnly signed and universally acclaimed as the greatest step in the history of the world toward outlawing war. A curious, if not tragic, fact is that leaders of public thought frequently ignore completely the significance of these notes. No nation signed this Pact until it was clearly specified that the right of self-defense was not to be affected in any way by the Pact and that, in case of disputes, the only nation which has a right to pass on the question of whether or not self-defense was involved is the nation that claims that its self-defense was involved. I cannot recall, from my reading of history, a single instance of a nation going to war which did not claim that it was in self-defense or self-preservation. Under the Pact they clearly have the right to judge this question as they see fit.

I for one do not believe that nations should, with great pomp and ceremony, sign documents whose eventual effect may be absolute zero and only serve to increase cynicism and obstruct useful solutions through delusory plans. In my humble opinion, the peace of the world and better international relations and the future of international law will be promoted only when the nations of the world agree to sign simple, clear-cut treaties, complete on their face and not nullified or obscured by annexes of whatever sort they may be. If the statesmen of the world are afraid to sign such documents because their people may object to them or not be prepared to carry them out, it is useless to sign them at all. In the last analysis, treaties will not be carried out unless they meet with the approval of the people. Events of the last several years have demonstrated this point repeatedly.

And now, let us turn to something more cheerful—the forthcoming Pan American Peace Conference. In this connection, I ask you to bear in mind my preliminary remarks because I am convinced that this conference will succeed or fail to the extent to which the basic factors already outlined are given due consideration.

The problems of the New World happily are far less complicated than those of the old. Because of geographical, political, economic and traditional reasons, we have many factors in our favor. But even here, effective agreements will be possible only when they are based on practical, mutual interests. There are more differences of interests between the nations of the Western Hemisphere than some of the enthusiasts of Pan American solidarity are prone to admit. However, in a number of important ways, these interests are uniquely parallel. And it is on this basis that we ought to approach the question of promoting closer political and economic relations between these nations.

To a pronounced extent, the economic life of these countries (at least on a multilateral basis) is mutually complementary, instead of being in basic conflict. As one example, the United States has many products which Latin America needs and does not produce in sufficient quantities, and, on the other hand, the United States can use profitably many Latin American products.

On the other hand, while we have racial, temperamental and cultural differences, we all had a common political motivation which has been a permanent inspiration in our quest for social justice and international good will. While the process has not been faultless in internal and external affairs, the will to peace, friendliness, coöperation, self and mutual respect dominate the Americas today and we can therefore confidently expect that the Western Hemisphere may lead the world in blending its actions with the highest ideals of mankind.

In view of the disturbed conditions of the other continents, the possibility and desirability of promoting a closer economic unit among the Americas is of major importance. It seems to have in an unusual way the important essential of mutual interests. Closed economies, restrictions and regulations are today an impediment to the natural flow of commerce between nations and the access to credit and services that some countries can provide to others that are in need of them. A general confusion of the economic functions of creditor and debtor nations is stifling the development of the latter while the former are choking in their isolationism. And yet one hears of struggles for the possession of the sources of raw materials. The trouble today is not that of retention or immobilization of raw materials by countries possessing them, but the lack of markets in countries that could consume them. I do not know of any country possessing raw materials that requires to be pressed or forced to exploit them. They are all only too willing to do it if they can find a buyer.

These economic fundamentals can be approached by the forthcoming

conference from a realistic point of view, and surely some solution will be found that, being a source of mutual benefits, may explode the confusion that mostly everywhere contributes in a degree to a retardation of human progress. Such discussion would be a logical development of the commercial policy inaugurated by the United States which has led to several trade agreements, including one which my own country has just ratified. These bilateral agreements should nevertheless be considered as the beginning and the foundation for multilateral pacts. In the broader field, perhaps a continental policy of general treatment could be discussed, such as the adoption of the most-favored-nation treatment, unconditional and unrestricted, as the basis of all commercial intercourse and commitment. This condition could become immediately operative as to its effects in the relations between the American nations only, and left open to the non-American States who wished to treat and be treated by all the American nations on the same basis. If there is any ground whatever for a closer economic unit among the American nations, it must rest on solidarity of interests and the protection thereof.

In connection with the practical development of economic policies, the adoption of means to promote commercial arbitration on a general and definite scale to cover commercial transactions between the Americas deserves special attention. Official and unofficial steps have been taken in the past. The fruits have been good and possibly now is a good time to expand further this worthwhile system to eliminate those irritating economic disputes which frequently lead to political disputes. As economics occupy a major rôle in international relations and economic disputes are fraught with danger for progressive development of cordial relationship when not for peace, it seems to me that anything that can be done to promote plans to remove economic friction will be a definite contribution to the promotion of inter-American relations.

A necessary requisite for the promotion of economic relations is the closer coöperation of the central banks and credit institutions of the Americas so that credit and capital may move more freely in the performance of their normal functions in the development of commerce. Once the fundamentals of closer economic relations have been laid down on a permanent and stable basis, the coöperation between credit institutions can be instrumental in avoiding to a considerable extent the impact and aggravations to the Americas of world economic disturbances such as was experienced by some countries during the present crisis. And this closer coöperation between credit institutions may be further instrumental in bringing about a more desirable flow of capital in respect to quality, intent and direction because, much as some countries may be in need of foreign capital for their development, they are cured of concession hunters and exploiters who have directly and indirectly contributed probably more than any other group to international ill feeling and regrettable incidents in the past.

As for peace pacts as such, I have not as yet reached any conclusion in

my own mind, perhaps because I am not properly qualified, as to whether the purpose in the Americas will be better served by having a new pact or rather by obtaining more general applications of existing pacts or adopting as a basis one of those that have been submitted. As you well know, there are already in existence a wide variety of such agencies and pacts resulting from previous Pan American Conferences. Unfortunately, many of these are operating only partially. On the other hand, others have been submitted for discussion but not adopted. At the Montevideo Conference, Mexico presented its very interesting peace plan which was deferred for discussion during the next general conference. Your own distinguished President, Dr. James Brown Scott, has prepared a no less interesting draft for the establishment of a Pan American Court of Justice. Detailed plans for such a court have been under discussion for many years. Central America had in operation its own court, and I venture to say that had it been born a quarter of a century later, its history would have been quite another one.

A further matter concerns a subject that has been much debated by your Society, namely, the question of neutrality and neutral rights and obligations. Your country, in recent months, unilaterally has promulgated new neutrality policies. As has been repeatedly emphasized by your statesmen, these problems concern not one nation alone; they concern all nations that expect to stay at peace. Furthermore, it is universally recognized that while a large, powerful nation acting alone may be partly successful in safeguarding neutral rights, the measure of success will be greatly increased if neutral policies can be promulgated and protected by joint coöperation.

Unquestionably the interests and ideals of the Western Hemisphere lie in the path of peace, not war. As the international horizon at present is black with the clouds of war, the nations of the continent should be giving this matter their careful and constant attention to insure that we shall not be involved in such wars. If war unfortunately comes in a large scale in other parts of the world, our joint interests and our duty to mankind demand that we stay out of it, and this means to be prepared for neutrality.

As the World War showed, the wish for neutrality is far more simple than its execution. Some of our American nations might very easily remain neutral, but if we are not prepared for neutrality, this may be at a complete sacrifice of our rights as neutrals, and our economic life, both internal and external, may be taken completely out of our control and directed by one or more belligerents for their own interests, as happened more than once during the World War. Colombia was neutral then and many of its citizens still remember the irritating interference with their economic activities and neutral rights. If sovereignty implies the right of every nation to become a belligerent, it should likewise imply the right to remain a neutral.

The prime purpose of a joint neutrality policy of the Americas would be to keep the nations of the Western Hemisphere out of any world conflict. However, it should be borne in mind that a Pan American neutrality policy

or a unilateral neutrality policy by the United States has two implications, one that affects the rest of the world, and the other the American nations between themselves. I am not as yet certain in my mind whether one general formula would meet both ends, particularly if it is not coëxistent, as far as the Americas are concerned, with an effective peace mechanism. As far as a joint policy would concern the rest of the world, I think that it could contribute immeasurably to general peace. The combined resources of the Americas are so enormous (more than one-half of all the economic resources of the entire world) that with such a policy we could do much to deter nations from resorting to a widespread conflict, contribute to hastening its end if unfortunately started, and during the conflict furnish a better assurance that the minimum neutral rights of the Americas would not be lightly ignored.

Last but not least we have the educational and cultural activities as a subject which should receive permanent preferential attention by all the American nations, and perhaps special consideration by the forthcoming conference, for they are not only essential in the promotion of better inter-American relations and understanding, but likewise in the enforcement of permanent peace based on right and justice. On the subject of the bearing of education upon international relations, the Honorable Francis B. Sayre, Assistant Secretary of State, delivered a very constructive and illuminating address at a recent celebration of the University of Chattanooga from which I should like to quote the following pertinent excerpts:

> Ignorance, upon which jingoism and intolerance feed, may cause the shaping of policies which will wreck a nation; misinformation and misunderstanding of the true issue may lead to false policies and untenable conclusions which will play havoc in the international world. If we are to avoid economic breakdown, if we are to avoid war, we must first conquer the widespread ignorance and the widespread misunderstanding which exist in every country today. This is a challenging and a thrilling task for education. In the universities, in the schools, perhaps more than anywhere else, in the homes, growing children must be educated to an understanding of the fundamentals which make for sound international relationships and thus underlie in the last analysis the issues of war and peace. . . . Experts can map out sound policies; but as long as there continues to exist widespread ignorance of the facts and the issues of underlying commercial policy, those with selfish interests to serve will successfully play upon this ignorance. Until through education we can build the defenses of a more adequate understanding, the ultimate welfare and protection of the nation's national and international interests never can be made secure. The profound ignorance among the people of all nations as to the significance of these issues constitutes a very grave peril.

It is only through the medium of education that we can preserve and enhance in the Americas the will to peace and its afferent,—the will to social justice and economic freedom; that the citizens of all the American nations may proudly and enthusiastically participate in this task with the knowledge

and assurance that peace among nations will only prevail, by a well informed popular determination, for there can be no permanent peace among nations or internal economic security and well-being as long as the instruments of peace and economics are in the hands of professionals whose cupidity is stimulated by the indifference and ignorance of nations and citizens.

Some of you may feel that I have been overlooking the fact that a number of American nations, including my own, are members of the League of Nations and that some of the projects that I have mentioned would seem to be incompatible with obligations assumed under the League. I see no such incompatibility. It is becoming more and more recognized, even by the most ardent enthusiasts for the League on a world-wide scale, that the world is divided into regions and that the quickest way of making a world organization function effectively is first through regional groupings based on mutual regional interests. The plan recently presented by the French Government and now under consideration emphasizes this point of view. I should say that the goal is peace for the whole world if possible, but if not, then for a definite region, and with the hope that the development of regional peace in itself will contribute to the ultimate goal of general world peace.

And one final word about the forthcoming Pan American Conference. This conference is the successor of over one hundred other Pan American Conferences. Each of these conferences signed numerous agreements covering a wide range of subjects. Many of these agreements were never ratified and only a very small proportion of them had any substantial practical effect. My one wish for the coming conference is that they sign few treaties, but good, clear-cut treaties, after careful consideration by the signatories as to what those treaties will cost their own countries and then sign only after every one knows the price and is willing to pay it in the interest of promoting the general welfare, which in turn will promote the individual welfare. It is more important that they produce one good treaty of limited scope that will be actually carried out than to produce a hundred whose sole utility will be to furnish the occasion for signing pieces of paper with gold pens before a distinguished audience and deluding the world into thinking that something of great practical importance has been achieved. If the nations of the Western Hemisphere approach this conference in a sober spirit, bent on considering all practical realities as well as ideals, refusing to sign anything without having counted the cost, and signing nothing without complete good faith stripped of all camouflage, this conference will promote not only the peace of the Americas but the peace of the world. It will promote sound international law not only for the Americas but for the world. Frankly, I feel that the present situation is such as to justify considerable optimism as to the practical fruits that will be produced by this conference.

The Toastmaster. I trust the ether waves were properly adjusted so that the speech which has been made by the Minister of Colombia went

directly to Dr. Scott, our President, for he would find in that speech many things that would warm his heart.

The next speaker was born in the land where treaties of the type just described, or one of the types just described, have been quite common. Various treaties have been described in this room during the last week, but an entirely new category has been suggested by the Colombian Minister, namely, treaties of diaphanous sincerity.

Such treaties have been made in recent years, and I am quite sure that that home of culture, Austria, has a very definite opinion of that type of treaty. However, I presume the next speaker may only refer to it. I am very happy to introduce to you the American Minister to Austria.

Address by The Honorable George S. Messersmith

American Minister to Austria

As an officer of the Foreign Service of our Government who has followed for years with deep interest the constructive work of the American Society of International Law, I consider it an unusual privilege to address this distinguished assembly. To a gathering such as this, which includes so many who enjoy well merited distinction in public and private life in our country, I cannot hope to bring anything novel. The limitations imposed by an after-dinner speech at this closing session of your annual meeting preclude any possibility of an extensive consideration of any one of the many vital problems which these troubled times in which we live have thrust on the attention of all everywhere interested in international relations, and the law and practice which underlie and govern them.

This dinner is a most pleasing close to your deliberations which have covered a wide range of subjects, discussed by men who have made, and are making constructive studies of the many-sided problems arising out of the relations of States and their peoples. The relations between States and the principles and rules of international law are based on the necessity for mutual tolerance and respect among the nations, founded on mutual understanding; just as the principles of domestic law are based on the necessity for mutual respect, tolerance and understanding between individuals. As historical background and actual conditions play so important a part in our understanding and interpretation of the position and acts of any country, it occurs to me that, as I have just returned home for a brief leave of absence from my post in Austria, it may interest you to hear something this evening of that country—which to those interested in international law and practice has come to assume an importance which may seem out of proportion to its comparatively small territory and population.

The Austria of today is a small country with a population of about six and one-half millions of people, of which two millions live in the capital, Vienna. But this little Austria is the gateway to that complex of important

States we collectively speak of as Southeastern Europe, and her geographical, strategic, cultural and historical position have made her of primary interest not only to her neighbors but to all Europe. She is a product of international agreements and her existence and welfare are therefore matters of real concern to all students of international law.

The historical background of modern Austria is so well known to you that I cannot even begin to touch on it even if time permitted. Sufficient it is to say that Vienna and so many sections of the country are alive with reminders of past glories which stir not only Austrians, but in which the peoples of the other States of Europe take pride as a part of their heritage.

The dismemberment of the Empire by the post-war treaties put an end to the political domination of Vienna, and Prague, Budapest, Belgrade and other capitals have assumed a new importance, but the Austrian cultural tradition has remained unbroken and Vienna rests a principal intellectual and cultural center of Europe. That during the post-war years in which the new and little Austria had to adjust her economic life to her new frontiers, and that during a good part of that period the adjustment was made more difficult by political pressure and a general European depression, and that she succeeded not only in maintaining her cultural tradition but in deepening and strengthening it, is one of the interesting and encouraging features of modern Europe.

The Vienna opera remains perhaps the finest in Europe. The great orchestras are intact. The Salzburg Festivals are now the finest of their kind in the world. The Burg Theatre is perhaps a unique theatre which has tenaciously held to its high traditions. The universities are more frequented than ever. Her public monuments are kept in good repair. Her museums are being expanded, rearranged and made more accessible and full of meaning to the masses. The Vienna medical faculty and her philosophers and scholars draw visitors and students from all over the world.

In the spirit of true culture Vienna has in a period when narrow nationalism has gained so much ground, kept her doors open to artists, scholars, scientists, and ideas. No less than four of the leading artists at the State opera this last season were Americans. The Burg Theatre on its slender financial resources did not hesitate to give Maxwell Anderson's *Queen Elizabeth*, a production which from every point of view was an artistic achievement of first order. An American opera reached its première at the *Volksoper*. No less than eight modern American plays were produced on the Vienna stage this past season. The most enthusiastic reception given by the public to musicians this year, I may remark, was accorded to some of the many foreign artists who can be heard every day in Vienna.

The tenacity with which Austria has held on to what it deemed precious of its past must and has commanded respect, especially among those who have realized the financial sacrifices involved. Even such institutions as the Vienna boy choristers, founded six years after the discovery of America by

Maximilian, Emperor of the Holy Roman Empire and ruler of Austria, have not been allowed to suffer. The Spanish Riding School, founded by Maria Theresa, in the middle of the eighteenth century, continues to function. The famous Consular Academy, founded by Maria Theresa for the training of the diplomats of the old Empire, no longer necessary for the new Austria and much too expensive to function as such, has been turned into an international training school for diplomats which is frequented by young men from all over Europe, and from our own country.

It is perhaps, however, in the economic field that the new Austria presents the greatest surprises. It was customary up to a few years ago even for economists to say that Austria could not possibly live within the borders assigned her by the peace treaties—at least not without constant help from her neighbors and Europe as a whole. The experience of the years immediately following the peace treaties seemed to show that this opinion so generally held, and shared to a considerable degree in Austria itself, was substantiated. But now in more recent years she has shown that not only is she able to live within these borders, but gives promise in more normal times and with more normal relations with her neighbors to prosper.

The private financial structure has been placed on a sound basis. This involved heavy sacrifices for the people of Austria and for many other countries. The results, however, have been noticeable and beneficent to a degree that Austria was again beginning to offer interest to foreign capital. The public finances are subject to a certain control by the financial committee of the League of Nations, which has a resident representative in Austria. Although the infant years of the new Austria were years of severe and drastic readjustment during which the entire economy of the country had to be contracted from an empire basis, and during which economic depression harassed all Europe, and political problems assumed great importance within the country and at times caused additional financial burdens, the budget in recent years has been brought closely to balance. The position of the public finances today is considered by European experts quite sound and it is well known that the Austrian schilling is considered as one of the most stable and sound currencies in Europe.

Certainly during the last two years the financial, economic and general situation in Austria has slowly but steadily improved. I can unfortunately do no more than state the fact here, for the factors and conditions which have brought about this so unexpected result are so numerous and require so much background that time does not permit any discussion. I may just say in substantiation that, a few days before leaving Vienna, the Minister of Finance informed me in a private conversation that the government receipts from taxes during the first two months of this year were about twenty millions of schillings in excess of the collections during the same period of last year. When it is observed that taxes have not been increased, the significance of those figures is apparent.

The public credit of Austria has as a consequence of this quite sound financial policy acquired more strength. In spite of the advice given to her government from certain quarters within and without the country to follow the example of so many other countries in repudiating or ceasing payment on her internal and foreign obligations, Austria has continued to meet service on all her foreign obligations except those from which she has been exempted for the time being. I shall always remember with what pride Chancellor Dollfus one day told me that Austria would continue to meet her obligations as long as she possibly could, and it was clear from his tone that he meant what he said. He remarked that when Austria's friends were so loyally and strongly supporting her in the hard struggle to build up her new life and to maintain her independence, simple loyalty demanded that she meet her obligations which included service on her debts.

The economy of Austria is perhaps better balanced than that of some of her neighbors, and although this has proved a precious factor in these difficult years, Austria, like all of her neighbors in the Danubian basin and in all Southeastern Europe, cannot really prosper until close economic relations are established between these States. The dismemberment of the old empire through the post-war treaties has been much criticized. Certainly we know now, seventeen years after these treaties, that while from the political point of view this division of the empire may have been on the whole wise and expedient, from the economic aspect a healthy situation can be brought back only through the close economic coöperation in the whole Danubian basin which prevailed under the empire. A great deal of lip service has been rendered to this idea in recent years but little real progress was made as there was not sufficient incentive and pressure to subordinate selfish interest to the general good. This coöperation, it is now appreciated, in no way prejudices the territory or the sovereignty of any of the succession or Southeastern European States, and should be realizable on a basis of internal preferences for which Europe is showing understanding.

The road to this coöperation has been opened by the commercial treaty just signed by Czechoslovakia and Austria. It is needless to say that no Danubian agreements can be fully effective which are not open to and provide for the coöperation, or have the blessing, of the great European Powers. The Danubian States, and in this Austria and Czechoslovakia have led the way, have shown that in any and all commercial agreements they make they are prepared to admit all interested States as equal partners with equal responsibilities, but insisting on excluding political domination or immixtion from any source. Southeastern Europe definitely wishes to follow this road towards coöperation, and one hears very frequent reference now to that much quoted remark of Talleyrand that if the Austro-Hungarian Empire did not exist, it would be necessary to invent it.

I am sure most of you saw a very charming and well-done play several years ago, *Reunion in Vienna*, which depicted so dramatically and effectively

the manner in which a certain small class in Austria and the succession States looked backward. I have endeavored in these few remarks to give you a more real picture of the New Austria looking forward. While clinging to the best and finest in her culture and traditions, she has gallantly and courageously adapted herself to the new conditions. She has proved that she can live and has the will to live. She is not the object of charity which some have pictured her. She is a self-respecting and self-sustaining member of the family of nations. She has developed in her population a keen will to maintain her independence and integrity, and desires, as so frequently stated to me by the Chancellor and Vice Chancellor, nothing more ardently than to be friends with her neighbors and the whole world.

There are many misconceptions which prevail concerning Austria, the conditions which exist there, the form of her government, and about her leading statesmen. Her two leading figures—her Chancellor and her Vice Chancellor—so different in many ways, are both ardent patriots whose course of action is guided by the single desire to maintain Austrian independence and culture. Chancellor Von Schuschnigg is in his early forties and the son of a former general in the Imperial Army. Prince Starhemberg, in the middle thirties, is a man of strong character and romantic background. His family is older, it is said, than the Habsburgs. Both are keenly conscious of the fact that the New Austria is a product of international agreements and that there is no country in Europe whose future is more dependent on international agreements, international confidence, and international law. Their public declarations and Austrian policy have been based on this confidence in international agreements and international law.

In aiding to bring about a renewal of enlightenment and allegiance to international law, and in a restoration of confidence and mutual respect among the nations, this Society and similar organizations in the new and the old world, may play a great constructive rôle, realizing that it would be futile to study and define the details of international law unless these are to safeguard in actual practice the foundations of the life of States.

The Toastmaster. We certainly appreciate these messages coming from members of the Diplomatic Service, and I am sure you will all with me, and certainly with Dr. Scott, wish that this Eighth International Conference of American States which is about to be summoned, will be one of the very greatest successes. We would equally wish that this country, in which we are so ably represented by our Minister, should go forward in the very remarkable struggle which it has made in recent years in order that it may obtain the old standing of culture which has long existed in Austria.

We now come near home and are dealing with the making of people who carry on in international relations. It is a great pleasure to introduce to you the Reverend Edmund A. Walsh, Regent of the Georgetown School of Foreign Service.

Address by Rev. Edmund A. Walsh, S. J.

Regent of the Georgetown School of Foreign Service

Mr. Toastmaster, members, and guests of the American Society of International Law: The remarks of His Excellency, the Minister from Colombia, have suggested to me what may be a practical application of the function of a broad understanding of the differing cultures that exist in various countries and in various races as a determinant and as influencing exceedingly their international policies.

The long and turbulent history of the human race would seem to reveal certain sharp divisions—lines of demarcation, as it were, that mark the end of the recognizable periods and indicate definite transitions to new forms of social, or political, or religious, or economic organization.

The journey of a Jewish maiden to Bethlehem in the reign of Caesar Augustus, and the subsequent birth of the Eternal Word made flesh of her flesh furnished one such milestone, the most significant of all, since, as a matter of record, it divided human history, both sacred and profane, into its two most significant periods—Before Christ and After Christ. The fall of the Roman Empire was another, marking, as it did, the end of the first and greatest World State, whose degeneration and disintegration ushered in those thousand years of anarchic, undisciplined evolution and groping towards stabilized political life on the continent of Europe which we describe as Feudalism. The voyages and discoveries of John Cabot, Vasco da Gama and Christopher Columbus in the fifteenth century opened up new worlds both in territory and in the awakened imagination of venturesome pioneers. The sequel of their daring penetration into uncharted seas was destined to influence profoundly all succeeding generations and inaugurate a titanic conflict for colonial possessions among the European sponsors of those explorations.

The religious revolts of the sixteenth century split Europe anew and laid fresh disaster on the still unhealed wounds cut into the body of Christendom by the previous schism of the East from the West. The Treaty of Westphalia in 1648 marked the end of feudal psychology and initiated the modern State System and that era of unstable political equilibrium called the Balance of Power. The advocacy of unlimited national sovereignty as developed by Bodin and his school, and which was later concretely applied by Fichte, Hegel and Treitschke, furnished the juridical and ethical justification for Absolutism and Chauvinism. In the words of that keen observer, Salvador Madariaga: "The world, till then organic, broke up into independent units. Those immense and powerful beings, the nations, rose up between Christianity and the Christian. They disintegrated Christianity with sovereignty; they crushed the Christian with absolutism."

That was the specific political contribution of the emerging modern mind.

The revolt of the American colonies in 1776 heralded the end of European

supremacy and the decline of the principle of monarchy in the Western hemisphere. A new concept that thrilled and electrified was added to the vocabulary of political science as Democracy ventured forth from the groves of Academe to vindicate, in the concrete and on continental proportions, the inalienable, natural rights and liberties of the broad masses of the people.

Simultaneously, in the latter half of the eighteenth century, the Industrial Revolution ushered in mastery of production and ushered out the production of masterpieces. That was an especially important transition—a step forward as men enthusiastically believed—backwards, as we now fear. For the logical evolution from machine to electric power only served to increase the anarchic competition of unrestrained productivity until humanity, in 1929, sank bewildered, exhausted and well-nigh suffocated beneath the very abundance of material commodities created by its own feverish but undisciplined ingenuity.

1914 marked the end of a definite historical epoch in human history. For four years the nations of the world vied furiously with each other burning up the hard-won wealth accumulated during the previous phase and in destroying some twenty million human beings, killed, maimed or starved, among whom was the very flower of the age. Untaught, unimpressed, and undismayed by that holocaust, the captains and the kings are debating again whether it be not time to cry "havoc" anew and let slip the dogs of war—which are now reinforced by reconnoitering vultures in the air raining down bombs and poison gas on helpless populations.

If every historic movement in the progress of the race has, in its day and generation, left some lasting impress on humanity and contributed something to the direction of man's destiny, what significant heritage have we received from the enlightenment of the last twenty years?

I submit that what is being revised and analyzed and tested is the concept of civilization itself. The very fabric of organized society has been affected by doubt. Pessimists of the Spengler school confidently predict the collapse of the Western state system and Occidental culture. Sociologists and economists are concentrating their efforts on a technological solution. But a prior problem must first be faced—the possibility of establishing an acceptable norm of civilized living. By that I mean the prolegomena of civilization and culture must be re-worded. In previous ages the material conditions of life, characterized by isolation, localism and a larger measure of autarchy, made it possible for nations to exist more comfortably even under sharply different and even antagonistic standards for the conduct of human relations. But the triumphs of scientific invention since the Industrial Revolution, while vastly enlarging man's personal independence of nature, have contracted his social independence by creating economic, political, and financial dependencies.

The subsequent transition from the machine age to the power age in which we now live, profoundly influenced the external relations of highly

industrialized peoples. A new factor emerged in the form of a necessity to discover economic outlets for increased productivity. An immediate economic consequence was observable in the increase of widespread imperialistic adventuring into underdeveloped and colonial areas. There was, however, no concomitant production in the field of inter-statal philosophy comparable to the philosophy of competitive national production. There were agreements, to be sure, and recognized zones of influence, but few codes of moral behavior. The result has been that matter and force outdistanced mind and conscience, both in domestic and foreign policy. Hence derives the present impasse in the souls of men. One American writer has well phrased the problem:

> All reasoning apart from metaphysical reference is vicious. . . . Apart from metaphysical presupposition there can be no civilization. . . . You cannot consider wisdom or folly, progress or decadence, except in relation to some standard of judgment, some end in view.

There is a relativity in human judgments that creates widely divergent measures of values and standards of conduct. Those standards profoundly influence international relations. I recall in that connection the very illuminating reply of a pasha of Damascus which I heard a few years ago while traveling in the desert between the Tigris and Euphrates. It would appear that a French Sanitary Commission, intent on improving hygienic conditions, sent one of those all-inclusive questionnaires to the venerable ruler in that ancient civilization. The first question ran as follows:

> What is the quantity and quality of drinking water in the City of Damascus?

After much consultation with his muzzeins and other wise men, the pasha replied:

> Since the foundation of the City it has never been known that anyone died from thirst within the City walls.

The second question inquired:

> What is the mortality per thousand in the City of Damascus?

To which the pasha replied:

> It is the will of Allah that all men should die; therefore, out of every thousand inhabitants, one thousand die.

The last question was one of those universal and searching inquiries with which we are all familiar:

> Make some general comment on sanitary conditions in your City.

To which the pasha replied:

> Since Allah sent Mohammed to purge the world with fire and sword there has been a great improvement. Now, lamb of the West, cease your questioning. Man should not concern himself about those things that belong to Allah.

A similar significant incident came to my knowledge from another source a few years ago. A cable dispatch from Toronto announced that the temperature that winter had fallen to ten degrees below zero. A butcher entering his ice box found the temperature there at exactly freezing point—thirty-two degrees above zero. It was relatively warm inside, compared with the bitter cold outside. He moved an easy chair inside the refrigerator and passed the day in comparative comfort, coming out only when business required. Fantastic and bizarre though he might have appeared in a mellow southern clime, in point of fact he was forty-two degrees warmer in his refrigerator than the people on the street! Though ridiculous perhaps at Miami on the same date, who shall say that our butcher was "backward" or "uncivilized" in Toronto of his day?

The incident may well point a moral and adorn a tale. We are now in a favored position to learn much from the experiences of the past two decades during which men sought so zealously to organize peace in a distracted, a bewildered and a demoralized world characterized by diverse intellectual and ethical standards. In an address in London on Monday, October 8, 1934, Mr. David Lloyd George, war-time Premier of England, told his audience that when mankind strays, as it does in certain periods of history:

> into the morass of self-indulgence, materialism or false emotionalism, it is the great preachers alone that can make an appeal that will bring them back.
>
> When the chariot of humanity gets stuck, as it has done now, nothing will lift it out except great preaching that goes straight to the mind and heart. . . . It is time that the Christian Churches should act together and act promptly in the name of God and humanity. If the churches fail, I do not know what is going to happen.
>
> There is nothing in this case that will save the world but what was once called "the foolishness of preaching."

These plain words constitute confession of error from one who should know whereof he speaks, and register a plea, late though it be, for a savior whose salvation shall not derive from economic ingenuity or compulsory legislation or external machinery.

Effective and enduring peace begins in the intellect. It is reduced to external form by the will of the man. If it is merely commanded by a categoric imperative, execution of the mandate is liable to degenerate into a sheer armed conflict to ascertain whose will shall prevail. No matter how excellent the conclusions of the stronger party appear to him and how just his cause may seem to him, the ensuing triumph will be a Pyrrhic victory unless the intellect and heart of his adversary are won to acceptance of the indicated peace. Mere force, the quantitative argument, is not conclusive. No writer has left a more pregnant commentary in that regard than Saint Augustine in his *De Civitate Dei,* Book IV, Chapter four:

> If there be no justice, what are great kingdoms but huge robbery. . . . Elegantly and truthfully did that pirate answer Alexander

> the Great when captured by the Conqueror. For when the king asked the man what was he thinking about in thus making the sea unsafe, the freebooter answered with confident impudence: "Exactly what you are trying to do to the whole world. But because I am limited to one small vessel, I am called robber and thief. You do it with a great fleet and are called Emperor." [1]

The agony of the modern mind since 1914 has been due to a haunting persuasion that order was perishing in the world. To recapture order has been the hope, the consecration and the crusade of every high-minded statesman for the last twenty years. But what is order? What is peace? What is international justice? Whose order is to prevail? The diversity of natural gifts, the multiplicity of inherited traditions and prejudices—some legitimate, some ridiculous—the varying cultural standards that are perpetuated by geographical and political environment, the barrier of languages and racial differences, all conspire to make the problem as complex and delicate as are the varying definitions of culture, civilization and legality. The Anglo-Saxon ideal may not entirely coincide with Latin traditions of romanticism, with Slavic mysticism, with the Buddhist concept of Nirvana, nor the Teuton conception of order under a rationalized conviction of a special national destiny such as Fichte expounded in his *Reden an die Deutsche Nation* of 1808.

These manifestations of the deepest roots of national life have often been cavalierly neglected by a certain ardent type of internationalist unfamiliar with the obstinate and stubborn resisting power of tradition and age-long cultures. Actuated by a high and laudable idealism, he has often set a standard impossible of swift achievement and which should have been preceded by a generation of patient and laborious education to higher standards of international morality. When he fails, the last state of the problem is as dangerous as the first, for a sense of futility and disillusionment ensues.

The present sense of unachieved idealism has given rise to some curious reactions. Last summer I came across a new book in London, entitled *What is Patriotism?* which contained the following unusual suggestion:

> Pending the establishment of this machinery, there is one subsidiary step which, I think, might be taken with advantage. To Mr. A. A. Milne belongs the credit for the proposal that all Ministers of the Crown should in future be required on appointment to sign a document stating that they accept office in the full knowledge and understanding that they will be shot within twelve hours of the declaration of war by any Government to which they belong. I applaud the spirit of this suggestion, but

[1] *De Civitate Dei,* Sancti Aurelii Augustini, Hipponensis Episcopi, Coloniae, Bonnae et Bruxellis, J. M. Heberle, H. Lemperz & Comp., MDCCCL—*Liber IV,* Caput IV., pp. 140–141:—"Remota itaque justitia, quid sunt regna, nisi magna latrocinia? . . . Eleganter enim et veraciter Alexandro illi Magno quidam comprehensus pirata respondit. Nam cum idem rex hominem interrogasset, quid ei videretur, ut mare haberet infestum, ille libera contumacia, Quod tibi, inquit, ut orbem terrarum; sed quia id ego exiguo navigio facio, latro vocor; quia tu magna classe, imperator."

consider that it has a serious flaw; it might, and probably would, have such a deterrent effect upon candidates for office that democratic government would become unworkable owing to lack of governors. I cannot, however, find any objection to the proposal that in the next war only men over forty should be called to the colours. This proposal seems to me to be both practicable and just, for the following reasons:

(1) The old are proverbially and vocally patriotic, and extremely sensitive in matters affecting their country's honour. They should, therefore, welcome the opportunity to give proof of their patriotism in their own persons, and not, as hitherto, vicariously.

(2) The conditions of modern warfare no longer put a premium upon a high degree of physical fitness. The old can drive tanks or drop bombs as well as the young.

(3) Men over forty have already enjoyed some sort of life and can with great appropriateness be asked to risk what remains than the young who have had no life at all.

For all these reasons the proposal is, I feel such as patriots should welcome. Moreover, it has the advantage that its general adoption would enormously diminish the danger of war.

International law has a distinct and responsible function to perform in that laborious process of continuous education. Precisely because it possesses no sanction except the enlightened moral support of humanity, it can address itself more persuasively to the aroused suspicions of entrenched nationalism. The clear record of recent events has, I think, demonstrated that collective security is only possible under universal acknowledgment of fundamental individual rights which can be interpreted better, I have always thought, by a tribunal such as The Hague Court, than by an allied panel of the League of Nations. International law is an expression, in relevant juristic language, of the Law of Nature. Those who propose an independent justification of international order without recourse to natural law are inviting confusion and a return to Machiavelli. There would be as many contradictory norms as there are varying national interests. Public authorities and governments have so deliberately cultivated the philosophy of crass materialism, have so completely secularized their institutions, that they have well-nigh eliminated the one bond of possible unity among the peoples of the earth. They are figuring furiously at an unsolvable equation because they have scrapped the only common denominator.

It is one of the ironies of the situation, the outstanding illogicality of the age, that men should be crying for peace while rejecting or seeking to destroy the very cornerstone of spiritual conviction on which alone enduring peace can be established. You may as well hope to quarry granite with a razor's edge, bind the ocean liner to its moorings with silken threads, or manicure the tiger's claws with attar of roses, as attempt to rule the beast in man by sheer legalities unaided by moral control. Remove that motive from human conduct, and domestic government as well as international relations become an exercise of brute force or a battle of wits with the victory not always to the righteous. It would mean return to the ethics of the jungle.

The TOASTMASTER. It is too bad there may not be an opportunity for discussion after this address, because it suggests some practical conclusions on which no agreement has hitherto been reached in our discussions during the last few years.

When introducing the last speaker I wondered a bit how a man with the "Reverend" before his name might at the same time be a Regent of a School of Foreign Service. After this refrigerator story it has become clear.

Coming even nearer home in the Society, I wish to present to you one of the Vice Presidents who has been very active in the work of the Society—the Honorable Senator Elbert D. Thomas, of Utah.

AFTER THIRTY YEARS

BY THE HONORABLE ELBERT D. THOMAS

United States Senator from Utah

Nineteen hundred years before a wise man with a telescope showed that the universe was not made to serve the earth, and twenty-three hundred years before modern thought and science put man relatively in his place, a feast was given attended by men who loved thought and letters, the description of which now has a place in the literature of the world. Said one of those present: "Is not God great and is not nature grand, for here we have wild fowl, fish and the beasts of the field all slain that we might enjoy them, servants and slaves to serve us? Truly heaven remembers us and nature is kind to provide its abundance." To this, though, a young man present replied:

> Because man has servants and slaves and because man is favored above the animals and has the flesh of fowl, beast, and fish to eat is not proof that God created them for man. If you praise God for his foresight in providing for you the good things of nature, then gnats, fleas and mosquitoes may praise God for creating man for them, because they live on man. It is not well for man to think that he lives on other creatures, better for him to think that he lives with other creatures and that all get life from the same source, Mother Nature herself.

The prepositions "on" and "with" are common little service words, but the difference in the thought which they render is a difference of two cultures as wide as continents separated by an ocean. Internationally our problem is age old. Shall nations today live *on* other nations or shall they live *with* other nations?

The feast described above took place about the same time that logic was invented. The theory advanced was not the first reasoning in accordance with modern social thought, because a century and a half earlier the social aspect of the moral and religious commandment, "Thou shalt not kill" was given to the world by the great teacher who based his entire thought on nature instead of on revelation, and who made morals a matter of mutual

relationship between men rather than the result of a command. It was he who taught his followers to "Kill not the ox, for the ox is man's associate in the labor of the field."

It is in the realm of ideas that I trust we may keep our thoughts tonight. From the beginning of that time when people acted in groups almost to the very present, nations and peoples have never questioned the right to live on other nations and peoples. The theories of self-control and self-restraint when applied to nations, still by no means universally accepted, are not much older, as an expression of international right, than half of the past thirty years.

The outstanding phase in the realm of the evolution of ideas is the one which clusters about a notion of extending law to places where there had not been law before. At no time in the entire world have we had a law that spoke for all the world. The ancient theories about law in both the East and the West developed a concept which was called the law of nature and which was assumed to be universal. The second century A.D. saw the civilized parts of Europe and Asia administered from two centers represented by the great Han dynasty in China and the Roman Empire in the West. The Petrine theory of the Church and the universal theory of the Holy Roman Empire aimed at unity, but never were the facts of unity further from attainment. A telling restraint was impossible even in ordinary affairs. America was known only to those who lived here.

Today, politically speaking, there is no central authority. We speak of a World Court, but even if its jurisdiction were world wide, its judgment against a State could be enforced only when that State accepted the judgment. There is a society of nations extensive in scope, but that society exists not for itself, but for the benefit of its individual members. It itself cannot legislate, it itself cannot enforce. It can only discuss and recommend. If it is thought of as a unity its parts act merely out of a sense of duty to an ideal of national behavior and not from force either implied or actual. States are the only members of this society. Persons do not belong to it. There are no citizens of the League of Nations. In its constitution there is no place for a theory concerning citizenship as we have it in the 14th Amendment of our Constitution. These simple facts the thoughtless overlook.

Throughout history, when men and rulers gave lip service to a universal rule, the titles of kings and emperors reflected an unquestioned authority wherever the name of the king or the emperor could be thundered. But there was no unity. Today when the concept of real unity is heard only in a prayer to a universal or an eternal God, and all States stand in theory equal to all others, we have more actual unity than the world has ever seen before. It is the irony of history that when the fact of universal authority was asserted the world had no united will, and that now when the fact is denied, sovereign States show restraint and give at times assent to a united purpose. In this we may have the key to a better world. From this we

may learn that the bonds of steel and the bonds of force are as weak as the threads of a spider when compared to the bonds of sentiment. Where, then, shall effective international morality rest? Shall it rest on the strength of steel, on the forced contract, on the might of powder and shell? History has but one answer—strength, when asserted, has destroyed itself.

Institutional evolution in the past thirty years has developed the ability to destroy on a wide scale quite as much as the ability to preserve on a wide scale. But even in this there is food for thought. War has attained a possible mightiness which causes us to say that no longer do men fight men and armies fight armies, but whole peoples fight peoples. The aim to destroy, therefore, is so large that nothing is exempt. Modern war justifies the killing of the babe in the cradle because he is a potential soldier, and the destruction of all property because it may lend indirect assistance. In future war the individual will lose all rights and private property all security. Even in our country in the last war we became so logical in the administration of the draft act, that persons were denied the right to volunteer for service as soldiers.

My point may be illustrated by studying the theory of proposed laws to cover future wars. But the best illustrations are the actual ones found in such illegal war as Chapei and the present military ventures in Africa. Therefore, we drop bombs from the sky on anything and everything and we would sink and poison *en masse* regardless of time and place. Under such circumstances what is happening to the man who is made part of this destruction? Does it take a heroic man to drop bombs on a defenseless village? The element of courage is about as lacking as it would be in the man who has the stamina deliberately to run an express train over a child who happens to be playing on the tracks. When the chief job of a Roman legionnaire became that of attendant at crucifixions, Roman soldier *esprit de corps* became nil, and a soldier's life lost its glamour. Strength always destroys itself. I do not wish to cast any sort of reflection. I know the thrill of a uniform, and to me a nation in arms fighting a righteous cause is still a glorious page of history, but we must note what is actually happening.

For years armies and navies have done less fighting than anything else. The political and economic necessity of a great army in most military lands today is more important than its defensive or offensive necessity. This may be worthy of thought: Think back over the history of navies since steel and iron ships were invented. During our Civil War about 600 vessels were under hostile fire. Since the Civil War, to date, we have used some 700 ships of iron or steel construction, 176 have seen action, but only three out of 700 have been destroyed. Even in the World War there was such a preponderance of Allied navy, that most of our stronger units were kept on this side of the Atlantic. One reason for this was the shortage of cargo tonnage which made the problem of supply for great ships across the ocean important. These are facts of history. Their significance is known to those who know

that life is merely a process of change and history merely an explanation of that change. Armies and navies are justified and are justifying themselves more and more by services other than mere offense and defense. When in the process of change their purposes become spent, they will fall of their own weight. Of course few are willing to wait for the processes of history, and happily this is so, but the gods give to but a very few the blessing of making great history. Generally history makes the great man.

It is, then, to the realm of the idea that we must turn to find encouragement. In our changing attitudes we shall find them justified as they have been justified in the past by our building concepts for political, social, economic and national action upon accepted theories concerning physical law. In illustrating this point I shall not take you back to the ancient world. I shall stay in modern times. In the days when Newton's theory dominated thought about the physical world, political and national well being, we assumed, rested upon the theory of balance. Our Constitution reflects Newton. Our liberty was to be maintained on a balanced power in government. It was assumed that the forces in government were in constant opposition. The laws relating to the push and the pull in nature were transplanted and thought of as being fundamental, and they actually did dominate man in his thoughts about himself and other men.

When the Darwinian theory became the controlling thought, men beheld themselves and judged mankind a growing organism, or they saw man himself as an evolving animal. From this observation came the theory of change which brought about the acceptance of war on the basis of the survival of the fittest, or which supported the concept of peace on the basis of coöperation and mutual aid. The Darwinian theory lent itself to two opposing attitudes, one that we win by combat, the other that we go forward by mutual endeavor.

Today, very much more than anyone is conscious of it, we find our governing concepts based upon ideas which always reflect a relative association. Our fundamental thought is probably based on Einstein. We are faced with a present deduction that all things are relative and that the absolute is gone. Sovereignty is a relative proposition. National independence of action, like the freedom of the individual, has varying bounds and restraints. Perfection will be attainable but never attained. This brings us of course to the human social philosophy of the relative good—not the highest good as an absolute, but the best good as an objective. There is some hope for a better world if we can bring about the universal acceptance of these attitudes for both men and nations.

We must break down the absolutes if good will is to reign in the earth. An absolute in an international clash justifies us in killing a man because he is a Frenchman, or because he is an Italian, or because he is an Englishman! That is an indictment of civilized thinking, and properly such reasoning is being tempered by a changing attitude. Still we are in the midst of a strug-

gle to overcome this thought. Just as we had assumed that the great victory for individual man had been won when the law of citizenship was made to rest on place of birth rather than upon the fact of blood, we find a great State reverting to the blood notion. This, though, in an international sense is that State's way of handling the problem of a minority. This reference may thoughtlessly cause us to assume that the world as a whole is slipping back, but individual man who finds himself a member of a minority group can count mighty gains for his class in the last thirty years. Before the World War in Europe there were 40,000,000 people who were counted among the minorities—today there are but 10,000,000. Present day Russia's treatment of her minority groups is such a striking contrast to the old Russia's method that this problem of world-wide significance may find its solution in that land. If it should, what an epochal change we have witnessed without being conscious of it.

I count as the outstanding gain of the past thirty years the Statute of Westminster adopted in 1931. The British Commonwealth of Nations came into existence as a result of the World War, for that war and its peace brought to an end the legal structure of the British Empire. Once again history calls our attention to the irony of crooked thinking. When the parts of the British Empire were given separate seats in the Assembly of the League, the overly wise and overly cautious observers of our own land overlooked the real importance of that act. They presumed British selfishness and the stacking of the League Assembly with British votes. This was not so, as the Statute of Westminster proves. The arrangement was, in fact, the recognition of the principle of independence. Since 1931 an act of the Canadian Parliament is final. There is no appeal to the British Parliament, and there is no vetoing of an act by the British Parliament. Read the law:

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the powers of the Parliament of the Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

That is a changed attitude. The idea as expressed now was not original with the British Government of 1931. It is old thought. It was developed out of American experience and first suggested to England in 1775 when our American fathers just one year before they adopted our Declaration of Independence offered the theory to the British Crown in what is known in our history as the Olive Branch Petition. Under the Statute of Westminster a Dominion becomes a self-governing State, in Canada's case a republic, to all intents and purposes.

It is not for us here tonight to make the world over, but the stage is set

for a mighty change in outlook—a new attitude which will result in a new relationship—and it has all been done by the most peaceful of processes and the highest law of the British Commonwealth of Nations and the Congress of the United States. Let us review what has taken place step by step. First England speaks to Canada thus: "That which your Parliament decides shall be unquestioned by us." What latitude for changed attitudes and new relationships! Secondly Congress speaks: "When an American Republic finds itself at war with a non-American State, our neutrality law shall not apply." Is that a changed attitude? No, say many, that is as old as our Monroe Doctrine. But that is hardly true, for our Monroe Doctrine is of our own making while the provision in our Neutrality Act is America's response to the spirit of a similar act initiated by certain Latin American States during the late war. At the council table of the Pan American Union there has always been a vacant chair—a thoughtful reservation made for Canada. The stage is properly set today in law and attitude for that seat to be taken. All Americans pray for its fulfillment. It should happen before President Roosevelt's proposed meeting of all the Americas in 1936.

Canada may now take her seat in the Pan American Union. Under the Act of Westminster she may assume the status of an American Republic. She has long been a member in that sisterhood of States in spirit, now she may become a member in fact. The United States in her new neutrality law gave to Pan Americanism and the Monroe Doctrine new meanings. Neighborliness reflecting mutuality presages the sisterhood of American Republics.

The Monroe Doctrine, whether considered as an altruistic expression, a defensive measure, a reciprocal relationship or a regional understanding, is still of our making and depends upon us for its perpetuation. It was never a static proposition and it never will be, but the suggested concept of allowing it to evolve into the sisterhood of American Republics and making it just that, gives it an all-American ideal in very fact. With this changed attitude the responsibility for its maintenance no longer rests upon us, it rests upon the whole of North and South America. A union of spirit, a union of hope, a union of aspiration. A dream of a Bolivar come true! A dream even better than Bolivar's, for Bolivar thought in terms of a political unity. To us that thought seems and is an anachronism, for we know today a better and a surer unity. It is the bond of the spirit, a bond of mutual endeavor, a bond of mutual helpfulness. I shall leave this thought by reference to our ancient story, shall we live *on* our neighbors or shall we live *with* our neighbors? There is a greater chance today that we will choose the latter than we would have done thirty years ago.

Are we dreaming idle dreams when we speak of a new world built on self-control and self-restraint? The motto of the new Monroe Doctrine and the new Pan American Union, if I have caught its spirit, is "In unity there is strength, but only in self-control is there unity." After thirty years some dreams seem to be coming true!

The last thirty years have given the world many an international institution. The outstanding ones are the Council and the Assembly of the League, the Permanent Court of Arbitration, the Permanent Court of International Justice and the International Labor Organization. These institutions are not static. If we view them even during their short lives we discover substantial growth. If we get too close we may become discouraged, because they are very human. In purpose these institutions are complex.

Adhering to the theory that history is a process of change, the first stage of the League's evolution represented a combination of capitalistic nations against a revolutionary Russia. That stage passed with Russia's entrance into the League, and with its passing an entirely new approach to world outlook should have followed. In the Pacific, Russia, although an outstanding Pacific Power, was not a party to the Washington Conference and its treaties, this primarily because unconsciously the Washington Conference States accepted the League reaction against Russia. Russia's entrance into the League, like our recognition of Russia, gave Russia nothing which she was not entitled to, for she merely took a place which the Covenant-makers anticipated, but with her entrance there was a *de facto* change. Russia was no longer, either consciously or unconsciously, united against. As a naval Power she was free to build, while Japan, her nearest neighbor, was bound by treaty. This change should have been apparent to all. I, for one, attempted to make this plain and suggested a consultation of Powers bound by our Washington Conference treaties. Not a single editor, and I am sure no official, saw my point. Japan had left her place of easy access to the ear of the world when she withdrew from the League. In the matter of China's territorial integrity, Russia again was not bound, although by her own acts she recognized the spirit of the Nine Power Pact and later assumed the general League obligations. Thus the Five Power Treaties both needed revision and expansion. But no nation made the suggestion. In Europe sweeping changes brought like results. Changes like these were anticipated by the League framers. Article 19, if properly used, would keep the League a living organism, and that is what it must be if it is to serve long. Even a rigid constitution must not be a static document. Change is life's first fact. A peaceful process, a new idea, a changed stage for action with new relationships should attract the attention of governments quite as readily as do marching feet. Until the world learns this hardest of all social and political rules there will not be prosperity at home or peace abroad.

The world organization is faced with three conflicts which must be settled before the League can become stable:

First: The conflicts growing out of the relation between the League and the treaty of which the League Covenant is a part. One of the chief duties of the League is to aid in the enforcement of treaty provisions. If a treaty provision is unjust and the League attempts to perpetuate the injustice, the League cannot but fail. Such failures are due to the original injustice.

We may illustrate this by our own experience with the treaty. History will record the fact that our country accepted all the harsh, warlike elements of the Treaty of Versailles and dodged responsibility for constructive elements leading to world organization for peaceful process, but it also stands to the glory of our country that we have never attempted to enforce our rights under the treaty. Had we attempted to enforce all our rights or all of Germany's promises under the treaty, our armies would be still in the Rhineland. Has America failed because we did not see that the treaty was respected? The League has done quite as well as we have on that score. Has America failed because the Dawes Plan and the Young Plan are not working and we are not succeeding in collecting our debts? America has condemned by legal and governmental action the war between Italy and Ethiopia, but the war has gone on. It would be as logical to condemn us as to condemn the League for what is happening. The problem is not easy. I do not blame anyone, but I do blame the useless loss of life and property, the useless misery when these are measured by the accomplishments. It is not the method of international control that is at fault, it is the wrong-doer among the nations. If war is a crime, it should be treated as a crime is treated; if it is a disease, it should be treated as a disease; if it is a thing of glorious honor, let us recognize it as such, repent of the fact that in a moment of thoughtlessness we condemned it, and glorify all that war stands for.

Secondly: The League idea for maintaining peace in the world is built upon the theory of preponderance, that is, that all nations shall unite against an erring one. The alliance idea is built upon the balance theory. The two are in conflict. They do not and will not work together. I need not say more. My point is proved by the facts of today.

Thirdly: The great conflict which must be solved is whether the general theory or the particular right shall prevail. This problem has been our own. Even in our Federal Government we have not yet solved it. There is no way in the United States for the Federal Government to force a State against its will without creating civil war. Therefore, in the policies of world organization there will be no way of coercing a State against its will short of the use of war. If war is resorted to for the purpose of stopping war, war is increased, not diminished. It is on the acceptance of this political fact that I would suggest that we proceed. As long as the parts of world organization are sovereign entities, we must build on them and not upon the general idea. I can illustrate this by pointing out the primary reason why our naval conferences have not attained a more lasting success. We have attempted to approach the naval question in a general way by reducing tonnage, or the caliber of guns, or the number of guns or the instrument of destruction. That is definitely the wrong approach because it invites substitution and causes the individual nation to attempt to gain advantage within the agreement. For example, if tonnage is reduced in an attempt to control size, a nation may build larger ships by reducing the armour weight.

There is only one rule that I know that can be successful in international relations and that is that no nation asks another to do that which it itself would not do. Knowing this, why should we not attempt to make governments justify their own policies and their own defensive needs in the presence of other governments instead of attempting to curb one another. A Navy Department can justify its need to its own Parliament or Congress, but never does it speak frankly when it talks to the outside world. Take our own case for example. If we have an idea that we must fight the combined strength of all the fleets in the world in either the Pacific or the Atlantic, let us figure out how many ships, how many men, and how many airplanes it would take to do the job, then go into a conference and say that we need this minimum. It would be very much harder to justify an absurd national policy if nations were made to speak the truth and tell their fears; and when I say "to make governments tell the truth" I trust that no one will quote me as saying that governments maliciously lie. I would, however, like to know for my own satisfaction just exactly what America herself thinks should be her national policy in regard to defense. If all nations expressed themselves openly and asserted their real fears, the cure could be attempted. Until this is done, there will not be success in armament or naval conferences.

What are the significant facts that are of interest to the American Society of International Law which are noticeable in 1936, but which were hardly dreamed of in 1906? In 1907 I ran across a Japanese prophecy. It was a very old one. It said that when men should fly like birds, ten kings would go to war. As men have learned to fly, war has assumed a wider concern. I did not dream that I should see that prophecy fulfilled. If the prophecy had read, "when men fly, fifty nations will consult together in one place," I would not have believed that. In the last thirty years we have seen nations willing to leave to third parties the settlement of their differences. We have seen a complete reversal of fundamental theories in regard to national expansion. We have seen small nations justified especially in the minds of their own people when great nations through fallacious theories have brought misery to their own. "The white man's burden," "dollar diplomacy," and the pronouncement that "wherever an American dollar is invested, there should be an American battleship to defend it," are no longer uttered by the tongues of statesmen. "Spread eagleism" has ceased to be universal. America has reversed herself by stressing duties instead of rights in her neutrality policy. The mandate system has been tried and has worked as well in international law as the trustee system has worked in civil law. Neither can be cures for the advantage taker, the corrupt judge or the dishonest guardian. We have given the Philippines their independence. The futility of war and the fallacy of conquest have been proved.

In 1906 we used to say *tempus fugit*. Today we say "time marches on," and there is a difference in the thought behind those two expressions. More men come and go throughout the earth than ever before. The theory of

the right to war has at least been tempered. Still there is much to be done. It is only through institutional growth that men go forward. It is not, though, the institutions themselves that count, but the fundamental theories on which those institutions rest. It is in these theories that I rest my hope. Let us put law where law has not been before.

As Shakespeare gives to the devil the right to quote scripture for his own purpose, I have taken liberties with the thoughts of many and used those thoughts for my own purpose tonight. In closing I choose one more. I have used it much of late, for to me it furnishes the key to the success or the failure of present day international endeavor. In giving you this key I shall expand the ideas of the Greek Sophocles and cause Antigone to say, "It is easy to unite for evil, for war, or for hate, but it is hard to unite for love, for peace or liberty." Knowing, then, that the problem is a difficult one, where in the last thirty years have we room for discouragement? All institutions which men use today may fail, but the ideas behind them are here to stay. Nations having learned to talk together in one place, and States having shown a willingness to leave the settlement of their differences to third parties, the world now awaits a leader to breathe the soul of life into these great ideas that the dreams of the prophets may come true and the plans of the wise be not frustrated!

The TOASTMASTER. We express our sincere appreciation to those who have spoken to us this evening.

The Thirtieth Annual Meeting of the American Society of International Law is adjourned.

(Adjourned at 11:25 o'clock p. m.)

MINUTES OF THE EXECUTIVE COUNCIL

Thursday, April 23, 1936

The Executive Council of the American Society of International Law met on Thursday, April 23, 1936, at three o'clock p. m., at No. 700 Jackson Place, N. W., Washington, D. C. The meeting was called to order by the CHAIRMAN, Mr. CHARLES HENRY BUTLER. Upon roll call the following members were present:

ELEANOR WYLLYS ALLEN
EDWIN M. BORCHARD
HERBERT W. BRIGGS
CHARLES HENRY BUTLER, *Chairman*
FRANCIS DEÁK
JOHN DICKINSON
FREDERICK S. DUNN
GEORGE A. FINCH, *Secretary*
RICHARD W. FLOURNOY
JAMES W. GARNER
GREEN H. HACKWORTH
CHARLES E. MARTIN
CLARENCE E. MARTIN
FRED K. NIELSEN
ELLERY C. STOWELL
ELBERT D. THOMAS
AMRY VANDENBOSCH
GEORGE GRAFTON WILSON
LESTER H. WOOLSEY, *Treasurer*
QUINCY WRIGHT
CYRIL WYNNE

Communications of regret were presented from BESSIE C. RANDOLPH, CHANDLER P. ANDERSON, FREDERIC R. COUDERT, MANLEY O. HUDSON, PHILIP C. JESSUP, ARTHUR K. KUHN, JOHN BASSETT MOORE, JACKSON H. RALSTON, JESSE S. REEVES, JAMES BROWN SCOTT, and THOMAS R. WHITE.

The members of the Council rose in respectful memory of Honorable GEORGE W. WICKERSHAM and Colonel GEORGE T. WEITZEL, who died during the past year, and the Secretary was instructed to insert an appropriate minute in regard to them in the records of the Society. (This minute appears in the Proceedings of the Society, Saturday morning, April 25, *supra*, p. 178.)

The notice of the meeting was read by the SECRETARY, who also submitted the Minutes of the Executive Council of April 25 and 27, 1935, as printed in the Proceedings of the Society for that year. Upon motion duly made and seconded, the minutes were approved as printed. The SECRETARY also submitted the minutes of the Executive Committee of March 23, 1936, which were read and approved. The SECRETARY submitted the following report on the membership of the Society since the last annual meeting:

Membership at date of last report, April 25, 1935:		
Honorary members	9	
Life members	28	
Annual members	978	
	—	1,015

New members since last report:		
Honorary	*1	
Life	*2	
Annual	75	
	78	
Reinstatements	6	
		84
		1,099
Losses of membership since last report:		
Resigned	47	
Deceased (including 1 honorary member)	20	
Transferred from annual to honorary list	1	
Transferred from annual to life membership	2	
Dropped	42	
		112
Present membership		987
Net loss since last report		28

The report upon the finances of the Society for the year ended December 31, 1935, was submitted by the TREASURER, who made an oral explanation of its contents. The TREASURER also submitted a report by F. W. Lafrentz & Co. upon their audit of the Society's accounts for the same period, which was read and approved. The report of the TREASURER was thereupon received, approved and ordered to be filed.†

The EDITOR-IN-CHIEF of the *American Journal of International Law* laid before the Council the four numbers of the *Journal* published during the preceding year, as well as the Supplements containing the projects of the Harvard Research in International Law on the subjects of Extradition, Jurisdiction with Respect to Crime, and the Law of Treaties. He aso presented a written report upon the work of each member of the Board of Editors during the preceding year, which was examined and ordered to be filed.

The MANAGING EDITOR of the *Journal* made the following report upon subscriptions since the last annual meeting:

Subscriptions reported April 25, 1935		1,162
New subscriptions since last report	56	
Subscriptions canceled since last report	47	
Net gain		9
Total subscriptions April 23, 1936		1,171

He laid before the Council copy of an advertising circular which had been sent to 1,000 libraries and from which some of the new subscriptions had been obtained.

* Transferred from annual membership.

† It is printed herein, *infra*, p. 230.

The MANAGING EDITOR reported that the sum of $5,000.00 has been approved by the Executive Committee of the Carnegie Endowment for International Peace to be paid to the Society for preparing and publishing a second cumulative index to the *American Journal of International Law* and Supplements, and the Proceedings of the American Society of International Law. The MANAGING EDITOR stated that this sum was not sufficient to cover the cost of reprinting the cumulative index published in 1920, and after some discussion as to the desirability of reprinting the material in the first index, the following resolutions, upon motion of the SECRETARY, were unanimously adopted:

> *Resolved*, That the Executive Council expresses on behalf of the American Society of International Law its appreciation of the provision of funds by the Carnegie Endowment for International Peace to enable the Society to prepare and publish a second cumulative index of the *American Journal of International Law*, the Supplements thereto, and the annual Proceedings of the Society; and authorizes the Treasurer to receive the said fund and to disburse it for the purposes for which it was given upon vouchers approved by the Secretary;
>
> *Resolved further*, That the Secretary be and he is hereby authorized, to prepare and publish such a cumulative index to cover Volumes 15 to 30 inclusive, of the *Journal*, the Supplement and Special Supplements, and the Proceedings of the Society from the year 1921 to the year 1936 inclusive;
>
> *Resolved further*, That the second cumulative index when published shall be sold to the members of the American Society of International Law, to the subscribers to the *Journal*, and to other purchasers, at a price to be fixed by the Editor-in-Chief and Managing Editor of the *American Journal of International Law*, except as to such copies that may be requested by the Carnegie Endowment for International Peace for distribution by it, which shall be supplied free of charge.

Mr. GARNER, the Chairman of the Committee on the Selection of Honorary Members, reported the deaths during the preceding year of two honorary members, M. Adatci and Charles Lyon-Caen, and the Council by a rising vote expressed its great regret at the loss of these honorary members and appreciation of their services in the field of international law.

Mr. GARNER then reported that his committee had considered several suggestions of names for recommendation as honorary members, but had finally come to the conclusion that none of the proposed nominees was sufficiently outstanding in accomplishment in the field of international law to justify recommendation by the committee. After discussion the report of the committee was approved.

Mr. STOWELL, Chairman of the Committee on Increase of Membership, reported that he had sent letters to all members of the Society urging them to obtain new members, and that he had received gratifying responses. He suggested that the Committee on Membership be authorized to appoint subcommittees in various sections of the country to be designated as committees

for membership in particular regions, so that it may be practicable for groups of members to coöperate in increasing the membership of the Society. The recommendation of the Chairman was approved and recommended for adoption by the Council at its meeting on Saturday morning, April 25, when it names the Membership Committee for the ensuing year.

Owing to illness, Mr. Jessup, the Chairman of the Committee on Annual Meeting, was unable to be present. In his absence the SECRETARY presented the program of the thirtieth annual meeting of the Society and called special attention to the change in the location of the meeting from the Willard to the Carlton Hotel in Washington.

The Chairman of the Committee on Codification of International Law was also absent and the report of that committee was presented by Mr. GEORGE GRAFTON WILSON. Mr. WILSON'S report dealt with the work of the Harvard Research in International Law, the results of which are published in the Supplements to the *American Journal of International Law.* Mr. WILSON stated that funds have been obtained to carry on this research work for a fourth period on the subjects of Neutrality, the Recognition of States, and Judicial Assistance. On the first subject Professor Philip C. Jessup of Columbia University is reporter; on the second, Professor Edwin D. Dickinson, Dean of the School of Jurisprudence, University of California, is reporter; on the third, Professor James G. Rogers of Yale University is reporter. Mr. WILSON also stated that Mr. Charles C. Burlingham has been elected Chairman of the Advisory Committee of the Harvard Research in International Law to succeed Mr. George W. Wickersham, deceased.

Mr. HERBERT WRIGHT, Chairman of the Society's Committee on State Department Publications, then made an oral report showing favorable results of the efforts to obtain larger appropriations from Congress for these publications, and commendable progress in the actual issuance of them. He presented copies of a reprint of the hearings before the subcommittee of the House Committee on Appropriations containing the statements of the officers of the State Department in support of the appropriation, in which the report made last year by the Society's Committee on Publications of the Department of State is reproduced in full. Upon his recommendation, the Executive Council authorized the printing in the Proceedings of the Society of the Committee's written report, and recommended that the Committee be continued.

Senator ELBERT D. THOMAS and Mr. GEORGE GRAFTON WILSON, delegates of the Society to the American Council of Learned Societies, reported that they attended the annual meeting of the Council held in Washington January 31–February 1 last, and Mr. FINCH reported that he had attended some of the sessions of the Council as alternate, and also the Conference of the Secretaries of Constituent Societies held January 30 last. Mr. WILSON reported that the Council had decided to make a small appropriation toward the cost of preparing a dictionary of the terms of international law, but there

was no action requiring submission to the American Society of International Law.

Miscellaneous business was next in order, and the SECRETARY presented a letter from Mr. James Brown Scott, President of the Society, requesting permission to have his presidential address read by title in his absence and published in the Proceedings. Upon motion duly made and seconded, the Secretary was authorized to comply with Mr. Scott's request.

The SECRETARY suggested that telegrams of greeting be sent to Mr. Elihu Root, the Honorary President of the Society, and to Mr. James Brown Scott, its President, who is in Brussels attending the meeting of the Institute of International Law. The Secretary was authorized to present such telegrams for adoption by the Society at its first session.

The SECRETARY then presented a letter from the Honorable Harold L. Ickes, Chairman of the American National Committee of the Third World Power Conference to be held in Washington, September, 1936, inviting the Society to appoint two delegates to attend the said conference. After discussion in which the view prevailed that the work of this conference did not come within the scope of the Society's objects, the Secretary was directed to decline the invitation with an expression of the Society's appreciation.

The Executive Council next considered the number of Honorary Vice Presidents to be elected at the present annual meeting of the Society. After discussion, the following resolution was adopted:

> *Resolved*, That pursuant to Article IV, paragraph 1, of the Constitution the Executive Council hereby fixes the number of Honorary Vice Presidents of the Society at fourteen.

In further pursuance of the same article of the Constitution, the Executive Council authorized its Chairman to submit the following list of nominees as members of the nominating committee to be elected at the first session of the Society: HERBERT W. BRIGGS, RICHARD W. FLOURNOY, CHARLES E. MARTIN, FRED K. NIELSEN, CYRIL WYNNE.

This concluded the business of the Executive Council, and, upon motion duly made and seconded, an adjournment was taken at 4.35 p. m., to meet in the Carlton Hotel on Saturday, April 25, at 12 o'clock noon.

GEO. A. FINCH
Secretary

Approved:
CHARLES HENRY BUTLER
Chairman

MINUTES OF THE EXECUTIVE COUNCIL

Saturday, April 25, 1936

Pursuant to the adjournment at its last meeting, the Executive Council of the American Society of International Law met in the Carlton Hotel, Washington, D. C., on Saturday, April 25, 1936, at 12 o'clock noon.

The meeting was called to order by the CHAIRMAN, Mr. CHARLES HENRY BUTLER. The roll was called by the SECRETARY and the following members were present:

ELEANOR WYLLYS ALLEN
CHARLES HENRY BUTLER, *Chairman*
FRANCIS DEÁK
CLYDE EAGLETON
CHARLES G. FENWICK
GEORGE A. FINCH, *Secretary*
JAMES W. GARNER
GREEN H. HACKWORTH
ELLERY C. STOWELL
ELBERT D. THOMAS
AMRY VANDENBOSCH
GEORGE GRAFTON WILSON
ROBERT R. WILSON
FRANCIS COLT DE WOLF
HERBERT WRIGHT

The following officers were unanimously elected, the Secretary being instructed to cast a single ballot in each case:

Chairman of the Executive Council: CHARLES HENRY BUTLER
Secretary: GEORGE A. FINCH
Treasurer: LESTER H. WOOLSEY

The following members were likewise elected to the Executive Committee:

CHARLES HENRY BUTLER, *Chairman ex officio*
CHANDLER P. ANDERSON
GEORGE A. FINCH, *ex officio*
GREEN H. HACKWORTH
MANLEY O. HUDSON
PHILIP C. JESSUP
CLARENCE E. MARTIN
ELLERY C. STOWELL
GEORGE GRAFTON WILSON
FRANCIS COLT DE WOLF
LESTER H. WOOLSEY, *ex officio*
HERBERT WRIGHT

The following members were reëlected to the Committee on Selection of Honorary Members:

JAMES W. GARNER, *Chairman*
MANLEY O. HUDSON
FRED K. NIELSEN
JESSE S. REEVES

The Committee on Increase of Membership was, upon motion duly made and seconded, reconstituted as follows:

Ellery C. Stowell, *Chairman*	W. Clayton Carpenter
Fannie Fern Andrews	H. Milton Colvin, *Secretary*
Louis B. Babcock	Edwin D. Dickinson
	Clarence E. Martin

The Executive Council authorized the Chairman of the Committee on Membership to appoint subcommittees in various sections of the country to coöperate in increasing the membership of the Society, as recommended and approved at the preceding meeting of the Council.

After consideration, the Committee on Annual Meeting was, upon vote duly taken, appointed as follows:

Edwin M. Borchard, *Chairman*	J. Eugene Harley
Eleanor Wyllys Allen	Philip C. Jessup
Francis Deák	Charles E. Martin
John Dickinson	Parker T. Moon
Clyde Eagleton	Nicholas J. Spykman
George A. Finch	John B. Whitton
James W. Garner	Robert R. Wilson

The Committee on Codification of International Law was reëlected with the addition of Messrs. Charles C. Burlingham and Green H. Hackworth, so that its membership is constituted as follows:

Jesse S. Reeves, *Chairman*	Green H. Hackworth
Edwin M. Borchard	Manley O. Hudson
Philip Marshall Brown	Charles Cheney Hyde
Charles K. Burdick	Philip C. Jessup
Charles C. Burlingham	Arthur K. Kuhn
Frederic R. Coudert	Pitman B. Potter
William C. Dennis	Jackson H. Ralston
Edwin D. Dickinson	James Brown Scott
Charles G. Fenwick	Ellery C. Stowell
James W. Garner	George Grafton Wilson
	Quincy Wright

Pursuant to the action of the Society taken on the same day, the membership of the Committee on State Department Publications was continued as follows:

Herbert Wright, *Chairman*	William C. Dennis
Chandler P. Anderson	Philip C. Jessup
Kenneth W. Colegrove	Stanley P. Smith
	Charles Warren

As delegate and alternate to the American Council of Learned Societies Mr. George Grafton Wilson and Mr. George A. Finch were respectively,

upon motion duly made and seconded, reappointed for the four-year term ending in 1940.

The SECRETARY called attention to the fact that some members now serving upon the Council and committees of the Society had become delinquent in the payment of their dues and were subject to be dropped from the rolls of membership in accordance with the regulations of the Society governing the matter. After discussion the following resolution was adopted on this subject:

> *Resolved*, That any vacancies which may occur in the Executive Council or in the committees of the Society due to declination or inability to serve, or to loss of membership in the Society, be referred to the Executive Committee with power to fill the said vacancies.

The EDITOR-IN-CHIEF of the *American Journal of International Law* submitted a written report showing the work of each member of the Board of Editors since the last annual meeting of the Society. After considering this report the Executive Council unanimously reëlected the Board of Editors of the Journal as follows:

GEORGE GRAFTON WILSON, *Editor-in-Chief*
GEORGE A. FINCH, *Managing Editor*
CHANDLER P. ANDERSON
EDWIN M. BORCHARD
PHILIP MARSHALL BROWN
EDWIN D. DICKINSON
CHARLES G. FENWICK
JAMES W. GARNER
MANLEY O. HUDSON
CHARLES CHENEY HYDE
PHILIP C. JESSUP
ARTHUR K. KUHN
JESSE S. REEVES
ELLERY C. STOWELL
LESTER H. WOOLSEY
QUINCY WRIGHT

There being no further business, the Executive Council adjourned at 12.50 o'clock p. m. *sine die*.

GEO. A. FINCH
Secretary

Approved:
CHARLES HENRY BUTLER
Chairman

MINUTES OF THE EXECUTIVE COMMITTEE

November 24, 1934

By direction of the Chairman, the Executive Committee of the American Society of International Law met on Saturday, November 24, 1934, at 10 o'clock a. m. at No. 700 Jackson Place, N. W., Washington, D. C.

The meeting was called to order by Mr. CHARLES HENRY BUTLER, *Chairman*. Upon roll call by the SECRETARY the following members were present:

CHANDLER P. ANDERSON	FREDERIC D. MCKENNEY
CHARLES HENRY BUTLER, *Chairman*	JAMES BROWN SCOTT
GEORGE A. FINCH, *Secretary*	GEORGE T. WEITZEL
GREEN H. HACKWORTH	LESTER H. WOOLSEY, *Treasurer*

Letters of regret were presented from Professor MANLEY O. HUDSON and Mr. CLARENCE E. MARTIN.

The SECRETARY read the notice of the meeting.

He presented a letter of November 7, 1934, from the Department of State to the President of the Society requesting it to designate a member to serve on an advisory committee to coöperate with the members of the American Section of the International Technical Committee of Aërial Legal Experts. Accompanying the Department's letter was an outline of work of the International Technical Committee, and the Department's letter stated that the members of the Advisory Committee would be asked to serve without compensation. After consideration of the names of several members of the Society who might be designated to serve on the Advisory Committee referred to in the Department's letter, the PRESIDENT was authorized to invite Mr. Blewett Lee to serve on the said Advisory Committee, it being understood that the designation would not involve the Society in any financial or other responsibility.

The SECRETARY next presented an assessment of $10.00 made against the Society by the Code Authority for the Periodical Publishing and Printing Industry. He stated that the Society had taken no part in the formulation of this Code, had not signed it, and had received no benefits whatever under it, but on the other hand, the publishers of the Society's *Journal* and *Proceedings* had been obliged to increase their rates for printing these publications to comply with the provisions of the Code and that this increase is costing the Society between $300 and $400 additional each year. In view of these circumstances the SECRETARY stated that he had consulted with the Treasurer and the President of the Society and it seemed advisable to submit to the Executive Committee the question of the payment of this assessment, as such action might involve the making of other demands by the Code Authority upon the Society which might seriously interfere with its ability

to continue its work as it has been conducted since its organization in 1906. After discussion, the assessment of the Code Authority was referred for consideration, with power to act, to a committee composed of the PRESIDENT and SECRETARY of the Society and Mr. FREDERIC D. MCKENNEY.

The SECRETARY then submitted a proposal to send advertising circulars to the members of the American Bar Association calling attention to the supplements to be issued with the *Journal* in 1935 containing the draft conventions with accompanying comments of the Harvard Research in International Law on the subjects of Extradition, Treaties, and Jurisdiction to Punish for Crime. The SECRETARY submitted a proof of the proposed circular and stated that copies could be sent to the 28,000 members of the American Bar Association at a cost of $150 or $200. After consideration the following resolution was adopted:

> *Resolved*, That the Secretary be and is hereby authorized to incur an expense of not exceeding $200 for advertising the Journal and Supplement among the members of the American Bar Association.

Mr. WOOLSEY, the Treasurer, referred to the resolution adopted by the Executive Council on April 28, 1934, in regard to the memoranda concerning the securities of the Society to be made at the time of each transaction, and he suggested that the procedure might be simplified by omitting the requirement that such memoranda be made in quadruplicate. He thought that one copy of such memoranda duly signed by the officers of the Society as required by the aforesaid resolution, and left in the Society's safe-deposit box, would be a sufficient protection.

Upon due deliberation it was decided to amend the resolution of April 28, 1934, as requested by the Treasurer, and the following resolution was adopted:

> *Resolved*, That the second paragraph of the resolution adopted by the Executive Council on April 28, 1934, concerning memoranda to be prepared and signed covering transactions in the Society's securities be, and the same is hereby amended to read as follows:
>
> "One copy of said list so signed shall be left with said valuables in said box or safe and one shall remain with each of the persons signing same, and thereafter, upon access being had to said safe-deposit box a memorandum, dated and setting forth in detail all action taken, shall be prepared and signed by each of the entrants and left in said box, and a copy thereof shall be delivered to the Treasurer if he be not one of such entrants."

There being no further business, the Executive Committee at 11.15 o'clock a. m. adjourned *sine die*.

GEO. A. FINCH
Secretary

Approved:
CHARLES HENRY BUTLER
Chairman

MINUTES OF THE EXECUTIVE COMMITTEE

Monday, March 23, 1936

Pursuant to the call of the CHAIRMAN, the Executive Committee of the American Society of International Law met on Monday, March 23, 1936, at ten o'clock a. m., at No. 700 Jackson Place, N. W., Washington, D. C.

The CHAIRMAN of the Executive Committee, Mr. CHARLES HENRY BUTLER, presided. Upon roll call by the Secretary, the following members were present:

CHARLES HENRY BUTLER, *Chairman*	GREEN H. HACKWORTH
CHANDLER P. ANDERSON	FREDERIC D. MCKENNEY
GEORGE A. FINCH, *Secretary*	LESTER H. WOOLSEY

Letters of regret were received from WILLIAM I. HULL and GEORGE GRAFTON WILSON.

The notice of the meeting was read by the SECRETARY.

The SECRETARY informed the Committee that the President of the Society would be out of the country in attendance upon the meeting of the Institute of International Law at Madrid, Spain, during the period of the annual meeting of the Society, April 23–25, next, and that it would be necessary to select one of the Vice Presidents to preside in the absence of the President. He stated that it is desirable to select the presiding officer in advance of the meeting so that he would have time to prepare an opening address and to have his name and the subject of his address included in the printed program of the meeting to be sent to the members of the Society in advance.

Mr. ANDERSON, one of the Vice Presidents of the Society, stated that he would be unable to preside because of the state of his health. The SECRETARY reported that Mr. Manley O. Hudson, another Vice President, is spending some months in Europe and will not return before the annual meeting. The SECRETARY also reported that Mr. Jesse S. Reeves, another Vice President, had expressed his willingness to preside at the meeting. After consideration, and upon motion duly made and seconded, it was

Voted, That the Secretary be directed to convey the invitation of the Executive Committee to Mr. Jesse S. Reeves, a Vice President of the Society, to preside at the annual meeting.

Voted further, That in case Professor Reeves cannot preside, the Secretary be authorized to invite Professor George Grafton Wilson, an Honorary Vice President of the Society.

The SECRETARY laid before the Committee a list of the books and pamphlets which have accumulated in the office of the Society, aside from the Society's permanent library consisting of bound volumes of journals sent

in exchange for the *American Journal of International Law*. The SECRETARY called attention to the minutes of the Executive Council of April 25, 1935, in which he reported that these books and pamphlets were of no use to the Society and recommended that they be disposed of. The Council on that occasion referred the Secretary's recommendation to the Executive Committee with power. After discussion and, upon motion duly made and seconded, it was

> *Voted*, That the President and the Secretary of the Society be appointed a special committee with power to offer the choice of the books and pamphlets referred to, first to the library of the Carnegie Endowment for International Peace, then to the Library of Congress, and then to other libraries in their discretion.

There being no further business, the Executive Committee adjourned *sine die* at 10.25 o'clock a. m.

GEO. A. FINCH
Secretary

Approved:
CHARLES HENRY BUTLER
Chairman

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There being no further business, the Executive Committee adjourned *sine die* at 10.25 o'clock a. m.

GEO. A. FINCH
Secretary

Approved:
CHARLES HENRY BUTLER
Chairman

TREASURER'S REPORT

January 1 to December 31, 1935

INVESTMENT ACCOUNT

ON HAND JANUARY 1, 1935:		
Cash on deposit with American Security and Trust Co....	$ 384.90	
$6,000 Cuban Northern Railways, 5½s (cost price)	5,914.58	
$1,000 Argentine Government, 5½s (cost price).....	972.90	
$2,000 Australian, 4½s (cost price).....	1,853.75	
$ 500 Associated Gas and Electric 5's (cost price).....	457.01	
$ 500 Illinois Power and Light Corp. 5's (cost price)	480.28	
Total.....		$10,063.42

		RECEIPTS	DISBURSEMENTS
TRANSACTIONS DURING THE YEAR 1935:			
Jan. 1.	Cash on hand at American Security & Trust Co.	$ 384.90	
Apr. 1.	Interest on American Security & Trust Co. deposit.....	3.95	
Apr. 5.	Interest on American Security & Trust Co. deposit put in Business Account.....		$ 3.95
June 18.	Life membership—Prof. W. L. Godshall.....	100.00	
Oct. 1.	Interest on American Security & Trust Co. deposit.....	5.37	
Oct. 3.	Interest on American Security & Trust Co. deposit put in Business Account.....		5.37
Dec. 27.	Life membership—Miss Bessie C. Randolph....	100.00	
Totals.....		$ 594.22	$ 9.32
		9.32	
Jan. 1, 1936.	Cash on deposit with American Security & Trust Co.....	$ 584.90	

BUSINESS ACCOUNT

RECEIPTS

January 1, 1935. Cash on hand:			
American Security & Trust Company.....			$ 33.08
Petty cash.....			10.00
			$ 43.08
Membership dues:			
1934.....	$ 92.00		
1935.....	4,504.02		
1936.....	131.75		
Back dues.....	5.00		
		$ 4,732.77	

Subscriptions:			
1935	$2,031.75		
1936	2,551.75		
Subscriptions in advance	22.90		
		$4,606.40	
Foreign postage		372.97	
Proceedings sold:			
1934	$ 33.90		
1935	772.30		
1936	204.05		
		1,010.25	
Back numbers sold:			
Journals	$ 189.11		
Proceedings	52.30		
		241.41	
Analytical Index sold		4.50	
Banquet tickets		788.00	
Binding Journals for members		34.00	
Interest on securities:			
Cuban Northern Railways, 5½s	$ 330.00		
Argentine Government, 5½s	55.00		
Australian 4½s	90.00		
Associated Gas & Electric 5's	25.00		
Illinois Power & Light Corp. 5s	25.00		
		525.00	
Interest on deposit in American Security & Trust Co.		9.32	
Special Supplement sales		22.00	
Extra off-prints paid for		57.64	
Carnegie Endowment fund for free subscriptions		145.00	
Carnegie Endowment fund for second cumulative index		1,000.00	
Carnegie Endowment fund for Supplements containing Harvard Research draft conventions, with comments		5,000.00	
			$18,549.26
Cash on hand, Jan. 1, 1935 ($43.08) and total receipts ($18,549.26) Dec. 31, 1935			$18,592.34

DISBURSEMENTS

Salaries:			
Managing Editor	$2,400.00		
Clerks	1,020.00		
Assistant to Treasurer	480.00		
		$ 3,900.00	
Journal:			
Preparation	$ 164.51		
Printing	3,961.58		
Mailing	513.97		
Off-prints	179.72		
Miscellaneous	76.21		
		4,895.99	

Annual meeting:		
Printing and postage	$ 18.17	
Telegrams	.50	
Reporting	227.50	
Banquet	811.55	
		$ 1,057.72
Proceedings:		
Preparation	$ 6.94	
Printing	900.93	
Off-prints	45.11	
Mailing	102.18	
		1,055.16
Office expenses:		
Stationery and postage	$ 422.93	
Telegrams and cables	2.14	
Office supplies	43.23	
Binding	189.00	
Refunds	26.36	
Miscellaneous	179.63	
		863.29
Back numbers:		
Copies purchased	$ 9.00	
Postage for distribution	35.32	
		44.32
Preparation of second cumulative index		900.00
Advance purchase of paper for Journal and Proceedings		753.92
Advertising		165.16
Supplements containing Harvard Research draft conventions, with comments:		
Printing	$1,923.85	
Paper from stock	1,799.68	
Index	50.00	
Binding	427.50	
Shipping	280.10	
		4,481.13
Total disbursements		$18,116.69

SUMMARY

Total receipts during the year 1935		$18,549.26
Total disbursements during the year 1935		18,116.69
Credit balance for the year 1935		$ 432.57
Beginning balance January 1, 1935 (including cash on hand)		43.08
Balance		$ 475.65
Balance on deposit in American Security & Trust Co. January 1, 1936	$ 465.65	
Petty cash	10.00	
Total	$ 475.65	

ASSETS

Investments:		
$6,000 Cuba Northern Railways, 5½s (cost price)	$ 5,914.58	
$1,000 Argentine Government, 5½s (cost price)	972.90	
$2,000 Australian, 4½s (cost price)	1,853.75	
$ 500 Associated Gas and Electric, 5's (cost price)	457.01	
$ 500 Illinois Power & Light Corp., 5's (cost price)	480.28	
		$ 9,678.52
Cash:		
American Security & Trust Co. (Investment Account)	$ 584.90	
American Security & Trust Co. (Business Account)	465.65	
Petty cash	10.00	
		1,060.55
Accounts receivable:		
Unpaid dues		225.00
Paper paid for in 1935, and not used:		
262 lbs. at .09½		24.89
		$10,988.96

LIABILITIES

Accounts payable:		
Printing and mailing October Journal	$ 1,123.58	
Binding Part III of Supplement—October	420.00	
Printing index, etc. of Supplement—October	111.45	
Mailing supplement—October	207.55	
1936 Membership dues paid in 1935	131.75	
1936 Subscription fees paid in 1935	2,551.75	
1936 Proceedings paid for in 1935	204.05	
Balance of Treaty Series, League of Nations Fund	120.52	
Balance of allotment for free subscriptions	385.00	
Balance of allotment for second cumulative index	593.73	
Balance of allotment for October Supplement	518.87	
		6,368.25
Excess of assets over liabilities		$ 4,620.71

LESTER H. WOOLSEY
Treasurer

REPORT OF THE COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE

Your Committee, which was constituted at the annual meeting of the Society for 1934,[1] was continued at the annual meeting of the Society last year.[2] The Chairman of your Committee continued his activities in the manner authorized by the Committee last year, namely, he consulted those members of the Committee with whose views he was not already familiar and, because it was not practical to assemble them on short notice, he proceeded along the lines of their expressed views, calling upon them when necessary for advice and assistance. He accordingly kept a close watch on the Department of State estimates for printing and binding for the fiscal year 1936–37 from their preparation in the Department to their insertion in the Congressional appropriation bill and enactment into law. It is again a great pleasure to report wholehearted coöperation and sympathetic consideration throughout.

APPROPRIATIONS

In the preparation of the estimates to be submitted to the Bureau of the Budget and to the Appropriations Committees of the House of Representatives and Senate, the Chairman of your Committee was requested by Department officials to make suggestions and gladly availed himself of the invitation. Various questions of policy were discussed with Secretary of State Cordell Hull, Under Secretary of State William Phillips, Assistant Secretary of State Wilbur J. Carr, Assistant Secretary of State R. Walton Moore, the Assistant to the Secretary and Chief of the Division of Western European Affairs James Clement Dunn, the Historical Adviser Dr. Hunter Miller, the chief of the Division of Far Eastern Affairs Dr. Stanley K. Hornbeck, the Chief of the Division of Research and Publication Dr. Cyril Wynne, and other officials of the Department. The Chairman of your Committee has been in constant communication with Dr. Wynne, who has been frank and prompt in furnishing any information requested and sympathetic and appreciative in receiving any suggestions offered.

The original estimates submitted by the Department for 1936–37 called for $171,478, an increase of $12,620 over the estimates for last year. The Bureau of the Budget lopped off only $17,628, a little over ten per cent of the amount requested, but only about half as much as it cut off last year. Moreover, it should be noted that this reduction figure did not affect the items for publications, but was made up of items exclusively for binding documents in the Department's archives and library and printing stationery, forms and the like.

The estimate of $153,850 approved by the Bureau of the Budget was re-

[1] Proceedings of this Society, 28th Meeting (1934), pp. vi, 188 and 215.

[2] *Ibid.*, 29th Meeting (1935), pp. vi.

duced by only $3,850 by the House Committee on Appropriations to an even $150,000, an increase of $29,000 over the amount appropriated last year. In reporting the bill (H. R. 12098) to the House, Representative Thomas S. McMillan, in charge of the bill in its passage through the House of Representatives for Representative William B. Oliver, Chairman of the Subcommittee of the House Committee on Appropriations, explained:

> The reduction of $3,850 in the printing and binding appropriation is effected with the thought that some of the miscellaneous publications of the Department that are not absolutely essential may be eliminated or some of the publications of the international commissions may be deferred until a later date.[3]

Representative McMillan and the members of the Subcommittee showed their great interest and sympathetic appreciation of the Department's publication needs and the figures reported by them to the House give ample evidence of their willingness to do everything possible to carry out the reasonable program of the Department. It was through the initiative and ability of Representative McMillan that the bill passed the House on April 3 without the questioning of this item.

Representative McMillan is to be particularly complimented on the completeness of the testimony and the interesting material which he evoked from the witnesses. The testimony of Mr. Carr, Dr. Wynne and Dr. Hunter Miller was more extensive than last year,[4] and even more effective. Your Committee takes pardonable pride in the fact that its Report to this Society last year [5] has been reprinted in full in the House Hearing this year—the first time, it is believed, that such signal recognition has been accorded to the efforts of the Society in supporting the publication program of the Department of State. The Chairman of your Committee has written to Representative McMillan to thank him for his coöperation in obtaining adequate funds for the publications of the Department.

No testimony was necessary before the Senate Committee on Appropriations, but the Chairman of your Committee took the precaution of consulting Mr. Kennedy F. Rea, Clerk of the Senate Committee, with a view to being available if needed. The impeachment proceedings before the Senate delayed action of the bill by that body, but the bill was reported out and passed on April 22. Because of Senate amendments in other portions of the bill, it was necessary for it to go to conference, but no difficulty is anticipated in its ultimate enactment.[6]

[3] 74th Congress, 2d Session, House of Representatives, Report No. 2286, p. 6.

[4] Subcommittee of House Committee on Appropriations, Hearing on Department of State Appropriation Bill for 1936, pp. 85–95.

[5] Proceedings of this Society, 29th Meeting (1935), pp. 199–209; reprinted in Subcommittee of House Committee on Appropriations, Hearing on Department of State Appropriation Bill for 1937, pp. 52–59 (hereafter cited as Hearing).

[6] The bill was reported back from conference, April 30, 1936, in the Senate, and May 2, 1936, in the House, without amendment in the item mentioned.

Last year, Dr. Wynne, in a publication of the Department,[7] prophesied that the increased appropriation last year might "be taken as an indication that Congress is sympathetic toward the Department's publication program and that with the gradual return to normal conditions the printing and binding appropriations will be increased." The following table of the appropriations for printing and binding for the fiscal years 1930–1937 shows what this increase has been:

1930	$218,000	1934	$185,000
1931	301,665	1935	107,180
1932	285,000	1936	121,000
1933	220,000	1937	150,000

In appraising the figures in the above table, note should also be made of the fact that in recent years they do not include the figures for publishing reports and documents concerning international conferences and commissions, as the cost of such publications is generally met by separate appropriations and is not charged to the Department's printing and binding funds.

The upturn in printing and binding appropriations, so accurately predicted by Dr. Wynne, has been due, your Committee believes, in no small measure to the persistent work of previous Committees of this Society under Professor Philip C. Jessup and others—a work which is now beginning to bear fruit and renders all the lighter the burden of your present Committee—but particularly to the care and accuracy with which the Department estimates with their justifications have been prepared and presented by Mr. Carr and Dr. Wynne. This is all the more noteworthy, because of the fact that, while large cuts were made in many of the 1937 estimates for various activities of the Department, no such large cuts were made in the estimates or appropriations for printing and binding. The Chairman of your Committee has written to Mr. Carr to congratulate him on the able manner in which he and his associates presented the publication needs to the Subcommittee of the House Committee on Appropriations, to which Mr. Carr replied:

> It is a subject in which, as I think you know, Dr. Wynne and I have a very deep interest and due to his excellent presentation of the facts I believe we owe the favorable action which the Committee was good enough to take. Back of it all, of course, is the interest which you, as Chairman of the Committee on Publications of the Department of State of the American Society of International Law, and your associates, have shown and which, I hope, will continue to be manifested until we finish our treaty volumes and bring our "Foreign Relations" more nearly up to date. I feel convinced that it is important to make these volumes available to the public and particularly to the educational institutions and libraries of the country.

Because of the completeness of the testimony before the House Subcommittee, the Chairman of your Committee suggested that this part of the

[7] Cyril Wynne, Department of State Publications (Publication No. 724), p. 2.

Hearing be reprinted as a Department of State publication, so that it might be made available to the members of the Society and all other persons interested in the publications of the Department. This has been done and appears as *Status of the Foreign Relations and the Miller Treaty Volumes* (Publication No. 864).

MILLER TREATY VOLUMES [8]

In reporting the appropriations bill to the House, Representative McMillan stated that "the printing of the treaty volumes and additions to the series of volumes on foreign relations of the United States is approved." [9] A word or two about these two publications will therefore be in order.

As pointed out last year,[10] the problem concerning the first of these is in the main one of how fast the distinguished Editor of the volumes, Dr. Hunter Miller, can compile and write the comprehensive editorial notes which have added so much to the utility of the volumes. Your Committee is still of the opinion that, considering the nature of the publication, Dr. Miller has proceeded with the task before him in a remarkably fast manner. The volumes comprise a collection of complete and literal copies of the texts, in chronological order according to the date of signature, of all treaties and international acts of the United States which are or have been in force. The text of each treaty is followed by notes containing a veritable store-house of information regarding the treaty, the setting, the circumstances incident to its negotiation, its effect with the citation of relevant judicial decisions and other data of value to the laweyr and scholar.

With such painstaking and exact scholarship, it is obvious that the volumes can not be published with anything like the speed of an ordinary treaty collection. The dates of the publication of Volumes 1–4 were reported last year. Volume 5 (Oregon Treaty, 1846–1852) is largely in proof and is expected to appear during the present calendar year. Funds were already available for the publication of Volume 6 (1853–1859) and, thanks to the able presentation of the case to the House Subcommittee by Dr. Miller, funds for the publication of Volume 7 (1859–1868) are made available in the 1937 appropriation bill. If the printing of these volumes, which are in various stages of proof or preparation, can proceed with reasonable speed, they should be off the press during the fiscal years 1937 and 1938. More than this can not reasonably be expected.

The importance of this definitive treaty collection can scarcely be overestimated. In the Hearing [11] Representative Robert L. Bacon brought out the fact that "the treaties of the United States are the supreme law of the

[8] In the preparation of this section, acknowledgment is gratefully made of information furnished by Dr. Hunter Miller, Historical Adviser.

[9] 74th Congress, 2d Session, House of Representatives, Report No. 2286, p. 6.

[10] Proceedings of this Society, 29th Meeting (1935), pp. 206–207.

[11] Hearing, pp. 66–67.

land," that they "have to be interpreted by the courts just as much as a statute" and that "therefore they should be printed and available to lawyers and to the courts." That this definitive treaty collection has something more than mere historic value is further evidenced by a statement made by Dr. Miller before the House Subcommittee in response to a query of Representative McMillan:

> There was a case in 1934 before the Supreme Court. I think from a circuit court of appeals in St. Paul. It was a power case along the Pigeon River, and it involved the construction of the Webster-Ashburton Treaty of 1842. The same matter had been the subject of decision by the courts of Canada, including the Supreme Court of Canada, and it reached the Supreme Court of the United States.
>
> After the decision was rendered, I was looking at it and I noted that in no brief of counsel nor in any opinion of any court, either in Canada or in the United States, had the relevant provision of the Webster-Ashburton Treaty been correctly quoted in respect to punctuation, despite the fact that official publications both of the British Government and this Governmnt had been used.[12]

Although, as Representative McMillan pointed out, the chief argument for the publication of these volumes "is the historic and official value of this publication to the country, rather than its popularity," and although, as Dr. Miller pointed out, "the demand is necessarily confined to a comparatively limited group of people," the Superintendent of Documents has reported [13] the following distribution, not including the distribution to libraries, etc., as of December 2, 1935:

	Date of Pub.	No. Distributed
Volume 1 (short print)	1931	290
Volume 2	1931	362
Volume 3	1934	180
Volume 4	1935	100

A very important by-product of Dr. Miller's labors in editing the Treaty volumes is a volume of 138 pages, *List of Treaties Submitted to the Senate, 1789–1934* (Publication No. 765), which was issued in the summer of 1935. The items of the list of treaties covered by this publication number 928. They fall into the six numbered classes given below. The excess of 41 in the total given below is accounted for by the fact that various items of the list have at one time or another appeared in more than one class.

Class 1, accepted by the Senate	682
Class 2, amended by the Senate	173
Class 3, finally rejected by the Senate	15
Class 4, withdrawn by the President	21
Class 5, not finally acted on by the Senate	71
Class 6, transmitted for information only	7
Total	969

[12] Hearing, p. 66.

[13] *Ibid.*, p. 65.

The treaties are listed by dates of signature with cross-references to the Treaty Series numbers and the Statutes at Large for such of the treaties as went into effect. They are also listed numerically by the Treaty Series numbers. Considerable information is given concerning the treaties, including the dates of submission to the Senate, the action taken by the Senate, instances of unusual procedure, and the present status of the treaties. There is added also a list of the sessions of Congress and special sessions of the Senate, with the dates of beginning and adjournment.

This publication should be a revelation to those who have criticized the Senate on the ground that it obstructs the normal negotiation and ratification of treaties by the Executive. Dr. Miller's figures disclose the fact that over 70 per cent of the treaties submitted to the Senate have been accepted by that body without amendment and an additional 18 per cent have been accepted by the Senate with amendment, while less than 1½ per cent have been rejected outright by the Senate and only 7 per cent (including treaties recently submitted) have not been finally acted on by the Senate.

Early in 1936 this publication was supplemented by a pamphlet entitled *List of Treaties Submitted to the Senate, 1935* (Publication No. 817), in which the information is brought down to December 31, 1935. It is planned to issue a similar supplement at the beginning of each year covering the preceding calendar year. The period of the calendar year was adopted because of its approximate correspondence with the opening of the session of Congress.

FOREIGN RELATIONS

The other publication specifically approved by the House Committee on Appropriations is the *Papers Relating to the Foreign Relations of the United States*, popularly called by the short title, *Foreign Relations*. It is not necessary to repeat here a description of the character of the contents of those volumes. This has been well described by Dr. Wynne in his testimony before the House Subcommittee,[14] in the course of which he quotes in full the well-known Departmental Order of March 26, 1925. Since the issuance of that order, it is believed that the volumes have contained a record that is "substantially complete," but this has necessitated an increase in the number of volumes. Whereas formerly they appeared at the rate of one volume per year, during the fiscal years 1932, 1933, 1934 and 1935 the Department published eleven volumes, and during the fiscal year 1936 (which is not yet completed) already three volumes have appeared:

Volume	Fiscal Year	Pub. No.
1918 Russia Supp., vol. I	1932	222
1917 World War Supp. I	1932	228
1918 Russia Supp., vol. II	1933	330
1917 World War Supp. II, vol. I	1933	388
1917 World War Supp. II, vol. II	1933	389
1918 Russia Supp., vol. III	1933	390

[14] Hearing, pp. 47–48, 59–60 and 62.

Volume	Fiscal Year	Pub. No.
1918 World War Supp. I, vol. I	1934	465
1918 World War Supp. I, vol. II	1934	466
1918 World War Supp. II	1934	476
1919 Volume I	1935	660
1919 Volume II	1935	661
1920 Volume I	1936	809
1920 Volume II	1936	814
1920 Volume III	1936	816

This shows an average of three volumes per year for the last four fiscal years, an average which bids fair to increase, judging from the publication program for the next fiscal year. Two 1921 volumes will probably be issued before the end of the present calendar year. It is planned to issue during the fiscal year 1937 also two 1922 volumes and one 1919 Russia Supplement volume, provided that the consent of the foreign governments to print their respective documents is obtained, as well as two volumes of the Lansing Papers described below. It might be noted in passing that, at the suggestion of Mr. Bryton Barron, Chief of the Publishing Section of the Division of Research and Publication, the lettering on the binding of the three 1920 volumes, which were issued during the past two months, has been greatly improved, so that it presents a much more attractive appearance. A special word of praise is also due to Dr. Morrison B. Giffen, Chief of the Research Section of the Division of Research and Publication, and his associates, for maintaining in these volumes the same high standard of historical scholarship set by the late Dr. Joseph Fuller, his predecessor in that office.

Attention was called last year [15] to the criticism in some quarters of the fifteen-year gap between the date of the documents and the date of their issuance in the *Foreign Relations* volumes and your Committee, after careful investigation, discovered that this was not the fault of the Department of State, but that "the real reason for the delay . . . lies in the reluctance of certain governments to consent to the publication of their respective documents." Your Committee notes with interest that this is now beginning to be more generally recognized. Two views are expressed on this point. For instance, the *New York Times*, on May 3, 1936, in its special correspondence from Washington, declared sympathetically that few governments "will be willing to agree to the publication of important documents that are less than fifteen years old." On the other hand, an editorial in the *Miami Herald*, on April 13, 1936, entitled "No Publicity," says:

> This government has attempted to publish state papers after fifteen years, but has found the great powers object strenuously on the ground that after nearly three decades the subjects treated are too close for comfort in their relation to current events. Government is powerless under the rules of diplomatic custom which requires permission of a foreign government before its communications may be published. . . .
>
> Pitiless publicity never was, is not now and never will be within the

[15] Proceedings of this Society, 29th Meeting (1935), pp. 201–206.

> ken of international diplomacy. . . . It is an ideal as elusive as permanent peace and collective security. But it may be the key to encompassing these phantom hopes of a war-weary world.

Any attempt to lessen the gap without reference to the consent of foreign governments, your Committee discovered, would result in an incomplete, misleading or duplicate record. Your Committee, therefore, repeats these conclusions of last year, although it heartily endorses the sentiment expressed by Representative McMillan in his report to the House this year:

> The committee does feel, however, that the value of the foreign relations volumes would be considerably enhanced if the material contained in the different volumes could be released for publication by the governments concerned a shorter time after the events transpire. At present some 15 years must elapse before the foreign governments will consent to the publication of material contained in these foreign relations volumes. The committee is hopeful that the Department will continue its efforts to convince foreign governments of the value of narrowing the gap between the event and its authorized publication.[16]

Your Committee has been assured by Secretary of State Hull that the Department will not abate its efforts in this direction, and yet from the correspondence which the Chairman of your Committee has been privileged to inspect confidentially, he is inclined to agree with the conclusion expressed by Dr. Wynne before the House Subcommittee, in answer to a question of Representative Bacon, namely, that "there is no reason to believe that these governments will release for publication the important documents in their correspondence which are less than 15 years old." [17]

It should not be necessary at this late date to say anything about the desirability of the publication of the *Foreign Relations* volumes. This would be "carrying coals to Newcastle," so far as members of the Society are concerned. And yet your Committee can not forbear quoting a brief statement of Assistant Secretary of State Carr before the House Subcommittee:

> The foreign relations volume is the only regular way by which such diplomatic correspondence between this Government and other governments as may be revealed from time to time can come to the attention of the public and of students of international relations.
>
> Speaking for myself, I think it is a very important thing, because in any democratic form of government, particularly in our own form of government, the only way in which the executive can have the support of the people in connection with our foreign relations is to have the people informed of what is going on so as to give them an opportunity to judge of the wisdom of what is being done or advocated by becoming acquainted with our past action in similar cases. The publication of our diplomatic correspondence is really the only way that they may find out in any systematic manner what their Government has been doing in respect to their diplomatic relations.[18]

[16] 74th Congress, 2d Session, House of Representatives, Report No. 2286, p. 6.
[17] Hearing, p. 61.
[18] *Ibid.*, p. 60.

As an instance of what the Assistant Secretary probably had in mind, attention might be called to the nature of the contents of Volume II for the year 1920, which has just been issued. It contains 879 printed pages of diplomatic correspondence and other documents of a similar nature dealing with the relations between the United States and the following countries: Cuba, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, Germany, Great Britain, Greece, Guatemala, Haiti and Honduras. It is apparent from this list that a large part of the documents in the volume (343 pages) pertain to the regional area of the Caribbean and Central America. Under the heading "Great Britain" two sections deserve special mention, namely, that on oil exploitation in Mesopotamia and Palestine, and that on representations by the United States regarding a possible renewal of the Anglo-Japanese Alliance.

Under the heading "Germany" there are some 343 pages dealing with such issues as the occupation of the Rhineland and the intricate problems of reparations, of the disposition to be made of German ships and of the deliveries of German dyestuffs and chemicals. Of particular interest are the 67 pages of cablegrams, reports and instructions concerning the turbulent affairs in occupied German territory immediately after the World War. Among them are confidential communications from the then Secretary of State, Bainbridge Colby; Pierrepont B. Noyes, American observer on the Rhineland Commission; the American ambassadors at Paris and London; and the late Major General Henry T. Allen, commander of the American Army of Occupation and Noyes's successor on the Rhineland Commission. Noyes was considerably disturbed by the way things were developing. This caused him "to wish America out of it as soon as possible," and eventually led him to tender his resignation.

Of course, the papers included in this volume were compiled and arranged for publication over a year ago and it was a mere fortuitous coincidence that they happened to be on the Government printing presses, as an Associated Press dispatch phrased it, "when Germany established 'the watch on the Rhine.'" The revelations of these documents caused a mild sensation not only in the press of this country, where the story was carried in newspapers even of local circulation, such as the *Norfolk Virginian Pilot*, but in the press in Germany, which avidly seized upon it as bearing upon the reoccupation of the Rhineland by Germany. For a few days the officials of the Department of State were busy emphasizing the routine character of the publication. Even men in high places, who in the past had predicted dire diplomatic consequences if documents so recent were to be published, almost began to adopt an "I-told-you-so" attitude. Then—nothing happened, and subsequent events have thus far failed to disclose any untoward effects from the publication of this volume. It is believed that this instance constitutes a striking refutation of the argument against the advisability of publishing diplomatic documents as rapidly as consents can be obtained from other governments.

This volume also is as good an example as any of the interesting character

of the contents, typical of the volumes issued since the Departmental Order of 1925. When the reading public becomes more fully cognizant of the completeness of the material found in these volumes, their sale is bound to be stimulated, especially in view of the low cost of $1.50 to $2 per volume at which they are sold. In fact, the demand even now is so great that it is safe to say that their sale would be quite large, were it not for the fact that there is an extensive free distribution resulting from the simultaneous publication of these volumes also as House Documents. A statement of this distribution appears in Dr. Wynne's testimony, given in answer to Representative McMillan's carefully framed questions, from which [19] the following has been abridged:

House of Representatives	1,341
Senate	502
Held for orders from Government agencies	95
Foreign embassies and legations in Washington	56
Department of State	20
Library of Congress	10
Philippine Islands	3
White House	2
Superintendent of Documents	1
Total	2,030

In addition to this free distribution of *Foreign Relations* volumes as House Documents, there is also the following free distribution of the Department of State edition:

Depository libraries	383
Foreign exchanges	112
Library of Congress	5
Total	500

In spite of this combined free distribution of 2,530 copies, the Superintendent of Documents reports "that 233 copies of each of the three 1918 War Supplement volumes published in 1933–34 have been sold while the two 1919 volumes which were issued scarcely a year ago show a sale of 131 copies of each volume." [20]

The appearance of the regular 1920 volumes this month (April) suggests two other publications which have long been vigorously advocated by Professor Manley O. Hudson, Professor Philip C. Jessup and many other members of the Society, namely the Lansing Papers and the Peace Conference Documents. When Secretary of State Lansing left the Department of State, he took with him as was customary, his own personal memoranda and official papers concerning events in which he played a direct personal part. Two or three years ago his estate released these papers to the Department, which for some time has planned to issue them as a *Foreign Relations* supplement, the Lansing Papers. Various complications, which may readily be imagined,

[19] Hearing, p. 50. [20] Quotation from Dr. Wynne's testimony, Hearing, p. 49.

have prevented the realization of these plans up to the present, but there is reason to believe that these can be published during the coming fiscal year. It is estimated that they will make two volumes.

Another publication urged by various organizations including the Society is that of the Peace Conference volumes of *Foreign Relations*. The officials of the Department are desirous of publishing these, but feel that they would be a most incomplete record, if they did not contain the Minutes of the Council of Four. As the late Dr. Joseph Fuller, who made a most careful survey of all the Peace Conference material, used to express it, "To publish Foreign Relations volumes dealing with the Peace Conference which would omit the Council of Four documents would be to produce Hamlet without Denmark's best known Prince in the play." Your Chairman is in a position to say that, as recently as this month (April) efforts have been made to obtain the consents of the interested governments to publish a number of extracts from these Minutes, but up to the present the opposition of at least one powerful government has made this impossible, for of course the consent of all is necessary. Your Committee feels that the Department should be vigorously supported in these efforts to make the Peace Conference volumes as complete as possible. Such a publication would be of interest not only to teachers and practitioners of international law, but to historians and in fact the public generally. For instance, Ray Stannard Baker, the biographer of Woodrow Wilson, is particularly anxious that these documents be made available to the public.

The Chairman of your Committee reported last year [21] that he had taken the liberty of recommending to the Under Secretary of State the preparation and publication of a consolidated or cumulative index to the volumes of *Foreign Relations* which have appeared since the last combined index volume, covering 1861–1899. This proposal was received favorably by the Under Secretary and at that time it was thought possible that funds for such a project might be forthcoming from the Public Works Administration. A more careful consideration of this possibility, however, disclosed that such an arrangement was not feasible at that time. The importance of such a publication is evident from the fact that since 1899 thirty-two volumes of *Foreign Relations* have been published, necessitating the consultation of almost as many indexes, if one desires to follow a particular subject through those volumes from 1900 to 1920. The preparation of such an index volume would probably consume the better part of a year and by the time its preparation could be authorized, it is likely that the number of volumes to be covered would be forty. Such a consolidated index volume would be of great usefulness not only to historians, teachers and international lawyers, but also to the officials of the Department of State itself, members of Congress and the foreign service officers scattered throughout the world. The time saved to Government officials alone would more than warrant the expense of publication. Your Committee accordingly heartily endorses such a project.

[21] Proceedings of this Society, 29th Meeting (1935), p. 206.

PRESS RELEASES

Attention was invited last year [22] to the unusually large amount of material of current information contained in the printed weekly *Press Releases*, which are sometimes overlooked by persons desiring information on current topics. It is a disgrace that there are only 190 subscriptions to *Press Releases*, as reported by the Superintendent of Documents, although this constitutes a five per cent increase over last year. As the *Press Releases* in a way form a substitute for the *Foreign Relations* volumes during the fifteen-year delay in the publication of the latter, the suggestion has been made that the *Press Releases* might be given some better and more attractive title and that such new title, together with greater publicity as to the contents of these volumes, might lead to a considerably greater sale. The members of the Society, particularly those engaged in teaching, should take it upon themselves to use their influence with the university or public libraries with which they may be associated to have them include this moderately-priced publication among their regular subscriptions. In fact, the price is so moderate that many members of the Society would find it well worth the price for their personal libraries. Several of the members of your Committee take pride in the fact that they have complete sets from October 5, 1929, which they have had bound for permanent use and which they have found invaluable for ready reference in the preparation of their routine work and public lectures. No doubt other members of the Society have had a similar experience, if one may judge from the increasing frequency with which this publication is being cited in the literature of the field.

As forecasted last year, the material printed in *Press Releases* has been rendered more accessible by the publication of a combined index covering the period from October 5, 1929 (when the printing of the mimeograph releases began) to December 29, 1934. This appears as the regular index in Volume 11. Each half-year constitutes a volume. The current volume is Volume 14.

To show the quantity of current material of value to the lawyer and teacher interested in international law and related subjects which is available in this publication, your Committee has studied the *Press Releases* for the calendar year 1935 (Volumes 12 and 13) and submits herewith a list of some of the material contained in these two volumes which, together with other material, might appear in the *Foreign Relations* volume for 1935 when issued some fifteen years from now. The topics listed are not exhaustive of the current material on the foreign relations of the United States included in the weekly *Press Releases* during 1935, which in turn is by no means exhaustive of the material likely to be included in the *Foreign Relations* for 1935 when issued, but they are sufficient to indicate the broad character and wide range of such material.

[22] Proceedings of this Society, 29th Meeting (1935), pp. 203–205.

TREATY INFORMATION BULLETIN

Another publication, the importance of which is apt to be overlooked, is the monthly *Treaty Information Bulletin*. This publication continues to give complete available information concerning all bilateral and multilateral treaties in force or signed by the United States with other countries, as well as summaries of regulations and judicial decisions interpreting treaty provisions rendered by State and Federal courts and other important national and international tribunals. Here again it is a pity that the value of this publication is not recognized as widely as its contents warrant. The Superintendent of Documents reports only 145 subscriptions, although this constitutes nearly a seven per cent increase over last year. This is another publication which should be received regularly by university libraries and the public libraries of the larger cities. Members of the Society can do effective missionary work here also. After all, your Committee may be seriously embarrassed in its efforts to secure increased funds for the publications of the Department of State, if the publications themselves do not receive a support more nearly commensurate with their value as sources of authentic information.

ARBITRATION SERIES

Mention was made last year that the Department, largely as a result of the urgent recommendation of members of the Society, had expanded its general publications into various special series, including an Arbitration Series relating to arbitrations in which the United States is a party. During the past year and a half the Department has issued several publications in this series. First of all should be mentioned the documents in the *I'm Alone Case*. During that period six documents have been issued in this case:

	Pub. No.	Arb. Ser. No.
Claim Made by His Majesty's Government in Canada	209	2 (2)
Answer of the Government of the United States of America	208	2 (3)
Brief Submitted in Behalf of His Majesty's Government in Canada	464	2 (4)
Answering Brief of the Government of the United States of America	442	2 (5)
Joint Interim Report of the Commissioners and Statements of the Agents of Canada and the United States	748	2 (6)
Joint Final Report of the Commissioners	711	2 (7)

There have also been issued two volumes in the *Salem Claim Case* (United States *v.* Egypt): *Oral Arguments*, Arbitration Series No. 4(5), Volume I (Publication No. 668) and Volume II (Publication No. 669).

During the fiscal year 1937 the Department plans to issue volumes covering the Mexican claims under the protocol signed April 24, 1934 (Executive Agreement Series No. 57, revised) and the Turkish claims under the agreement signed October 25, 1934 (Executive Agreement Series No. 73). Other cases which may be passed upon during this period and, if so, will add to the publication in the Arbitration Series are the Trail Smelter Case with Canada (the pleadings of which are now being exchanged) and the so-called Dutch Florin Case.

CONFERENCE SERIES

The Department has also continued to issue, in its Conference Series, publications concerning international conferences in which the United States has participated. Among these have been:

	Pub. No.	Conf. Ser. No.
International Radio Consulting Committee (C. C. I. R.), Third Meeting, Lisbon, September 22–October 10, 1934: Report of the Delegation of the United States of America, and Appended Documents	827	21
Report of the Delegates of the United States of America to the Pan American Commercial Conference Held at Buenos Aires, Argentina, May 26–June 19, 1935	845	22
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During the fiscal year 1937 the Department plans to issue publications on the Naval Conference which was held in London during the past winter, the Pan American Peace Conference which will be held in Buenos Aires some-

time this year and the Conference to Discuss the Oil Pollution of Navigable Waters which will be held in Geneva this fall, and on the Pan American Financial Conference (Santiago de Chile), the Conference on the Revision or Abolition of Capitulatory Rights in Egypt and the Aviation Conference (Lima, Peru), if they are held.

TREATY SERIES AND EXECUTIVE AGREEMENT SERIES

Two very important series which are apt to be overlooked in appraising the volume of the publication work of the Department of State are the Treaty Series and the Executive Agreement Series. In the former no less than thirty treaties (Nos. 874–902, 904 and 905) have been issued since January 1, 1935, while in the latter series eighteen executive agreements (Nos. 57, revised, and 71–87) have been issued during the same period. Included in the Executive Agreement Series are the reciprocal trade agreements negotiated by Secretary of State Hull under the Act of Congress approved June 12, 1934. During the period covered by this report five of such trade agreements have been concluded: Belge-Luxemburg Economic Union, Haiti, Sweden, Brazil and Honduras. Addresses of officials of the Department concerning the trade-agreement program have occasionally been printed separately in a new Commercial Policy Series, with a cross-reference from the *Press Releases*.

NEUTRALITY PUBLICATIONS

As forecasted last year, Volume II of *Policy of the United States toward Maritime Commerce in War* was issued during the present fiscal year. This volume, like Volume I, was prepared by Carlton Savage, of the Research Section of the Division of Research and Publication, and it covers the years 1914–1918, the period of the World War. It was issued early in the present calendar year in preliminary form (Publication No. 821) with only a list of the relevant documents instead of the documents and was quickly seized upon by supporters of the proposed Administration bill on neutrality as well as by its opponents in support of their respective contentions. It is unnecessary to point out here that the volume appeared in the ordinary routine of the Department and that its publication at that time was a fortuitous, although happy, coincidence. The volume was issued in final form (Publication No. 835) two months later with all the relevant documents, not merely a list.

The passage of the Neutrality Law of August 31, 1935, and its extension and amendment on February 29, 1936, necessitated the issuance of a publication entitled *International Traffic in Arms: Laws and Regulations Administered by the Secretary of State, Governing the International Traffic in Arms, Munitions and Implements of War* (1st edition, Publication No. 787; 2d edition, Publication No. 794). This publication contains the text of the Neutrality Law, the text of the Presidential Proclamations issued in compliance with the Neutrality Law and other relevant documents. The current *Press Releases* from time to time give additional information on the registra-

tion of arms companies [23] and the exportation of arms, ammunition and implements of war.[24] It should be pointed out that publications such as the two editions mentioned can not be anticipated two years ahead, as is necessary in the case of those items specifically included in the annual budgets, but must be provided for none the less.

OTHER PUBLICATIONS

During the past year a large number of addresses, including those of Secretary Hull, Under Secretary Phillips and Assistant Secretaries Sayre and Welles, on a variety of topics concerning foreign policy have been printed separately. The current *Press Releases* give cross-references to these separate prints. It is presumed that this practice of separate prints with cross-references will be continued during the coming year. A majority of your Committee believes that it would be more desirable to have these speeches, at least those of the Secretary of State, printed in full in the *Press Releases*, but if they are to be printed separately in any event, the Department's contention that printing them also in the *Press Releases* would be an unnecessary duplication, coupled with the system of cross-references in the *Press Releases*, should safeguard the Department from any criticism in this direction.

The various regional area series will contain publications dealing with current events or subjects of special importance relating to the regional area concerned, as occasion may demand. For the sake of completeness, mention should be made of *The Territorial Papers of the United States*, prepared under the direction of Dr. Clarence E. Carter, of which Volume IV, dealing with the Southwest Territory (1790), is expected off the press momentarily and Volumes V and VI, dealing with the Mississippi Territory, are virtually ready for the printer and are expected to be published before the end of the fiscal year 1937. The volumes already issued in these and the other series mentioned above will be found in the quarterly cumulative *List of Publications* issued by the Department.[25]

Besides the publications already mentioned, the Department publishes a quarterly *Foreign Service List;* an annual *Register of the Department of State;* a monthly *Diplomatic List;* a semi-annual list of *Foreign Consular Offices in the United States;* Federal "slip" laws, session laws and Statutes at large; the *Consular Mailing List* of American consular offices abroad; publications on *The American Foreign Service;* [26] *Admission of Aliens into the United States with Supplement; The Immigration Work of the Department of State and Its Consular Officers;* passports and *Notice to Bearers of Passports;* [27] and many other subjects.

[23] For instance, Press Releases, January 25, 1936, pp. 97–99.
[24] For instance, Press Releases, January 11, 1936, pp. 79–84.
[25] The most recent issue brings the list down to April 1, 1936 (Publication No. 861).
[26] The most recent issue is revised to March 1, 1936 (Publication No. 850).
[27] The most recent issue is revised to March 1, 1936 (Publication No. 847).

Among the miscellaneous publications which it is planned to issue before the end of the present calendar year and which do not fall into any of the series are three which deserve special mention. First, a two-volume publication on *Damages in International Law* is now being prepared in the office of the Legal Adviser. Secondly, *a Style Manual of the Department of State,* which the Chairman of your Committee believes will have a wide circulation, judging from the manuscript which he was permitted to inspect, is being prepared under the joint authorship of Miss Margaret M. Hanna, Chief of the Office of Coördination and Review, and Miss Alice M. Ball, Chief of the Special Documents Section of the Division of Research and Publication. Thirdly, a complete revision of the text of *The Department of State of the United States,* with a map of foreign service posts and specially selected illustrations, is being prepared by Dr. E. Wilder Spaulding, Assistant Chief of the Division of Research and Publication, and Dr. George V. Blue, of the Research Section of the same division.

DOCUMENTATION OF PAN AMERICAN CONFERENCES

Although it does not properly fall within the purview of this Committee, the Chairman of your Committee feels that he should make some mention here of the result of the recommendations embodied in the Report of Special Committee on Documentation of Pan American Conferences,[28] of which he was also Chairman. This Committee was authorized by the Executive Council of the Society on April 26, 1934, and appointed by the Chairman of the Executive Council on April 28, 1934,[29] to confer with Dr. Leo S. Rowe, Director General of the Pan American Union, at the request of the latter, in regard to the above-named subject. After consultation with Dr. Rowe and Mr. Babcock, Librarian of the Pan American Union, that Committee submitted a report containing suggestions and recommendations looking toward "a uniform type and a systematic plan" for "the minutes and documents of the International Conferences of American States either general or technical," as contemplated by Resolution LIV of the Seventh International Conference of American States held at Montevideo, December 3–26, 1933. A few days ago, the Chairman of your Committee inquired of Dr. Rowe as to what use had been made of the report mentioned, and on April 23, 1936, Dr. Rowe wrote to the Chairman of your Committee the following letter, which requires no further comment:

> With reference to our recent conversation and the report submitted by your committee on the standardization of reports and documents of Pan American Conferences, I beg to say that since the receipt of your report the Pan American Union has followed the practice of communicating with the secretary general of Pan American Conferences recommending that the documentary material of the Conferences conform to the specifications set forth in your report.

[28] Proceedings of this Society, 29th Meeting (1935), pp. 210–214.
[29] *Ibid.*, 28th Meeting (1934), pp. 215 and 187.

It is also proposed that at the Eighth International Conference of American States this matter will be submitted for consideration and a formal expression of the Conference obtained with respect thereto.

CONCLUSION

On the basis of the material presented above, therefore, your Committee believes that the persistent efforts of the members of the Society in the past are continuing to bear fruit in an increased output of publications on an increasing variety of subjects. It feels, however, that these efforts should not be abated, but on the contrary should be continued with a view to rendering to the officials of the Department of State whatever sympathetic assistance is possible in carrying out a liberal and reasonable policy of publication. It accordingly recommends:

1. That this Committee (or a similar one) be continued.

2. That this Report be printed in full in the *Proceedings* of the Society, where it will be available to all the members of the Society.

3. That a number of reprints of this Report be made available to the Chairman of the Committee for the furtherance of the work of the Committee.

Your Committee would derelict in its duty if it did not express its deep appreciation of the uniform courtesy and willingness of the officials of the Department and of other branches of the Government to coöperate with the Committee in its endeavor to have publications issued which will meet the legitimate needs of the legal practitioner and the professor of international law and related subjects as well as the ordinary individual interested in the foreign relations of his Government.

HERBERT WRIGHT, *Chairman*
CHANDLER P. ANDERSON
KENNETH W. COLEGROVE
WILLIAM C. DENNIS
PHILIP C. JESSUP [30]
STANLEY P. SMITH
CHARLES WARREN

[30] Illness of Professor Jessup prevented him from reading the final draft of this Report.

LIST OF MEMBERS

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW*

HONORARY MEMBERS

Anzilotti, Dionisio, Permanent Court of International Justice, The Hague, Holland.
de Bustamante, Antonio S., Perfecto Lacoste, Apartado 134, Habana, Cuba.
Dupuis, Charles A. M., 118, rue du Bac, Paris, France.
Fromageot, Henri, 1, rue de Villersexel, Paris, France.
Huber, Max, Ossingen, Canton of Zurich, Switzerland.
Rolin, Alberic, Avenue Moliere 236, Brussels, Belgium.
Simons, Walter, Zietenstr. 35a, Berlin-Dahlem, Germany.
van Eysinga, W. J. M., 100 Rynsburgerweg, Leiden, Holland.
Williams, John Fischer, Bowling Green House, Oxford, England.

LIFE MEMBERS

Anderson, Luis, San Jose, Costa Rica.
Berrien, Laura M., 900 19th St., N. W., Washington, D. C.
Calonder, Felix, President de la Commission Mixte de Haute Silesie, Katowice, Poland.
Carvajal, Henriquez, Santiago, Cuba.
Chang, Ziang-Ling, Bearn Apartment, 469 Avenue Joffre, Shanghai, China.
Coudert, Frederic R., Jr., 2 Rector St., New York City.
Esty, Robert Pegram, 2716 Fidelity-Philadelphia Trust Bldg., 123 South Broad St., Philadelphia, Pa.
Finch, George A., 100 Virgilia St., Chevy Chase, Md.
Godshall, Wilson Leon, Box 120, Williamsport, Pa.
Greene, Jerome D., 25 Garden St., Cambridge, Mass.
Gutierrez, Gustavo, Obispo No. 89, Habana, Cuba.
Hyde, James Hazen, 18, Rue Adolphe-Yvon, Paris (16e), France.
Kodera, Kenkichi, 3 Nakayamatedori-Gochome, Kobe, Japan.
Wellington Koo, V. K., c/o Minister of Foreign Affairs, Peiping, China.
Marburg, Charles L., Lutherville, Md.
Meyer, Carl L. W., 3013 Cathedral Ave., N. W., Washington, D. C.
Pardo, Felipe, c/o Peruvian Legation, Washington, D. C.
Paul, Alice, c/o National Woman's Party, Washington, D. C.
Peaslee, Amos J., 501 Fifth Ave., New York City.
Portela, Epifanio, Argentine Legation, Rome, Italy.
Randolph, Bessie C., Hollins College, Hollins, Va.
Sammons, Thomas, 536 Deming Pl., Chicago, Ill.
Scott, James Brown, 700 Jackson Pl., Washington, D. C.
Sloss, M. C., Hunter-Dulin Building, San Francisco, Calif.
Stevens, Doris, Croton-on-Hudson, N. Y.
Tai, En Sai, P. O. Box 375, Hong Kong, China.
Warner, James Harold, Calle Espiritu Santo No. 2, Mexico, D. F., Mexico.
Wilson, Burton W., 370 Lexington Ave., New York City.
Yen, W. W., 44 Hongkong Road, Tientsin, China.

ANNUAL MEMBERS

Accioly, Hildebrando, Ministerio das Relacões Exteriores, Rio de Janeiro, Brazil.
Ackerson, G. G., Jr., Department of State, Washington, D. C.
Adamson, James, Victoria University College, Wellington, New Zealand.
Akzin, Benjamin, Harvard Law School, Cambridge, Mass.
Albersheim, Alberta G., 650 West End Ave., New York City.
Albrecht, Ralph G., 501 Fifth Ave., New York City.
Alden, Carlos C., 27 Ashland Ave., Buffalo, N. Y.
Alexandre, Emanuel, 80 Broad St., New York City.
Alfaro, Ricardo J., 1535 New Hampshire Ave., N. W., Washington, D. C.
Allen, Dwight Hubbard, 77 Addington Road, Brookline, Mass.

* Corrected to July 1, 1936.

Allen, Edward W., 1308–1916 Northern Life Tower, Seattle, Wash.
Allen, Eleanor Wyllys, 1925 Commonwealth Ave., Boston 35, Mass.
Allen, Florence E., Supreme Court, Columbus, Ohio.
Allen, Lafon, 1521 Kentucky Home Life Bldg., Louisville, Ky.
Allman, Norwood Francis, 206 Hamilton House, Shanghai, China.
Amram, Philip Werner, 1204 Packard Bldg., Philadelphia, Pa.
Anderson, Chandler P., Hibbs Building, 725-15th St., Washington, D. C.
Anderson, Elbridge R., 1 State St., Boston, Mass.
Anderson, William, University of Minn., Minneapolis, Minn.
Andrade, Eduardo, 969 Fifth Ave., New York City.
Andrews, Alexander B., 239 Fayetteville St., Raleigh, N. C.
Andrews, Arthur I., 68 Gray St., Arlington, Mass.
Andrews, Fannie Fern, 295 Commonwealth Ave., Boston, Mass.
Andrews, George F., 68 Gray St., Arlington, Mass.
Anema, A., Florastraat 11, Haarlem, Holland.
Angulo, Charles, 22 Exchange Pl., New York City.
Arcaya, Pedro Manuel, 1333 16th St., N. W., Washington, D. C.
Arens, Jean Lvovich, 7 East 61st St., New York City.
Armour, George A., Princeton, N. J.
Armour, Norman, Department of State, Washington, D. C.
Armstrong, Hamilton Fish, 45 East 65th St., New York City.
Armstrong, William Earl, 1808 Eye St., N. W., Washington, D. C.
Asbeck, F. M. Baron Van, 62 Cornelis Jolstraat, Scheveningen, Holland.
Atwater, Elton, 1766 Church St., N. W., Washington, D. C.
Auerbach, Joseph S., 1 Wall St., New York City.
Ayala, Eusebio, Asuncion, Paraguay.

Babcock, Louis Locke, 814 Fidelity Bldg., Buffalo, N. Y.
Babinski, Leon, Elektoralna 35, Warsaw, Poland.
Bachman, Paul S., University of Hawaii, Honolulu, Hawaii.
Bacon, Gaspar G., Prince St., Jamaica Plain, Mass.
Bacon, Ruth E., 17 Latin Way, Tufts College, Mass.
Bacon, Selden, 43 Exchange Pl., New York City.
Bagdonas, M., Lithuanian Legation, Washington, D. C.
Baker, Gibbs Latimer, Jr., Stoneleigh Court, Washington, D. C.
Baker, Joseph R., State Department, Washington, D. C.
Baker, Newton D., 1924 Union Trust Bldg., Cleveland, Ohio.
Baldwin, Walter A., Box 14, Cambridge 38, Mass.
Barber, Willard F., College of the City of New York, New York City.
Barclay, James, 2 Rector St., New York City.
Barnes, Chas. M., Department of State, Washington, D. C.
Barnett, James F., Box 218, Grand Rapids, Mich.
Barros, Ernesto, University of Chile, Santiago, Chile.
Barrows, David P., University of California, Berkeley, Calif.
Barrows, Kilbrith J., 319 Highland Ave., Winchester, Mass.
Bass, James H., 127 Sinsego, Pasay, Rizal, P. I.
Bassett, A., 175, Soochow Road, Shanghai, China.
Bàtor, Viktor, Manyoki ut. 20, Budapest I, Hungary.
Baty, Thomas, Foreign Office, Tokyo, Japan.
Baumann, R., 38 Bellevue Pl., Chicago, Ill.
Baxter, James P., 3rd, Harvard University, Cambridge, Mass.
Beach, John K., County Court House, New Haven, Conn.
Beardsley, Charles A., Claremont Country Club, Oakland, Calif.
Bedford, J. Claude, 2610 Girard Trust Company Bldg., Philadelphia, Pa.
Bello-Codesido, Emilio, Moneda 816, Santiago, Chile.
Bellquist, Eric Cyril, 855 N. Vermont St., Los Angeles, Calif.
Benevides, Jose, 16, rua Rosa Araujo, 30., D., Lisbon, Portugal.
Berdahl, Clarence A., University of Illinois, Urbana, Ill.
Berl, E. C., Delaware Trust Bldg., Wilmington, Del.
Best, William Hall, 50 Federal St., Boston, Mass.
Bewes, Wyndham A., 2 King's Bench Walk, London, E. C. 4, England.
Bingham, Joseph W., Law School, Stanford University, Calif.
Bishop, William W., Jr., 733 Oakland Ave., Ann Arbor, Mich.
Blackwell, James M., 52 Wall St., New York City.
Blaisdell, Donald C., University of Wisconsin, Madison, Wis.
Blakeslee, George H., Clark College, Worcester, Mass.

Bliss, Robert Woods, 3101 R St., N. W., Washington, D. C.
Bodine, William W., Villa Nova, Pa.
Boetzelaer, E. O. Baron van, Jollesstraat 7, Arnhem, Netherlands.
Borchard, Edwin M., Yale Law School, New Haven, Conn.
Bordwell, Percy, Iowa State University, Iowa City, Iowa.
Borel, Eugene, rue du Rhone 2, Geneva, Switzerland.
Borg, Dorothy, 411 East 53rd St., New York City.
Bosley, William B., 245 Market St., San Francisco, Calif.
Bostrom, W., 2249 R St., N. W., Washington, D. C.
Boutelle, M. H., 1123 Mt. Curve Ave., Minneapolis, Minn.
Bouvé, Clement L., Union Trust Bldg., Washington, D. C.
Bowman, Charles W., Brownsville, Pa.
Boye, Thorvald, Pilestr. 81 B, Oslo, Norway.
Bradlee, Helen West, 141 Milk St., Boston, Mass.
Bradley, Jay D., 1032 Stewart Ave., Atlanta, Ga.
Bradley, Phillips, 83 South Pleasant St., Amherst, Mass.
Brane, Dennis D., Western Reserve University, Cleveland, Ohio.
Brewer, John Withrow, Box 73, Mansfield Centre, Conn.
Briggs, Herbert W., 8 Boardman Hall, Cornell University, Ithaca, N. Y.
Brinton, Jasper Yeates, Cour d'Appel Mixte, Alexandria, Egypt.
Brosmith, William, 700 Main St., Hartford, Conn.
Brown, Alice M., 4000 Cathedral Ave., Washington, D. C.
Brown, Ammi, Box 1478, Washington, D. C.
Brown, Franklin R., 440 M. & T. Bldg., Buffalo, N. Y.
Brown, Grace H., 610 Detroit Savings Bank Bldg., Detroit, Mich.
Brown, H. Templeton, 212½ North Sixth St., St. Joseph, Mo.
Brown, Philip Marshall, Brownfields, Williamstown, Mass.
Brown, Robert A., Jr., 212½ North Sixth St., St. Joseph, Mo.
Brush, Florence, 186 Violet St., Floral Park, N. Y.
Buckley, David A., Jr., 406–10 Southern Bldg., Washington, D. C.
Buehrig, Edward H., Indiana University, Bloomington, Ind.
Buell, Raymond L., Richmond, Mass.
Buholzer, F. A., 60 East 42nd St., New York City.
Bullington, John P., Esperson Bldg., Houston, Texas.
Bundy, Harvey H., 30 State St., Boston, Mass.
Bungardeanu, Laurence, Roumanian Legation, Washington, D. C.
Burdick, Charles K., Cornell Law School, Ithaca, N. Y.
Burgin, E. Leslie, 3 Gray's Inn Pl., London, W. C. 1, England.
Burke, Daniel, 72 Wall St., New York City.
Burke, Thomas C., 1031 Marine Trust Bldg., Buffalo, N. Y.
Burling, Edward D., Union Trust Bldg., Washington, D. C.
Burlingham, Charles C., 27 William St., New York City.
Burr, A. G., Supreme Court, Bismarck, N. D.
Butler, Charles Henry, 719 Investment Bldg., Washington, D. C.
Butler, Nicholas Murray, Columbia University, New York City.
Byrd, William, 63 Wall St., New York City.

Caldwell, Louis G., 914 National Press Bldg., Washington, D. C.
Callahan, J. M., University of W. Va., Morgantown, W. Va.
Campbell, Henry Munroe, 3012 Union Guardian Bldg., Detroit, Mich.
Campbell, Ira A., 417 Park Ave., New York City.
Capron, C. A., 20 Exchange Pl., New York City.
Cardozo, Antonio J., 501 Old South Bldg., Boston, Mass.
Carey, Gertrude, 31 Gibbon St., Marlboro, Mass.
Carey, William H., 15 Exchange Pl., Jersey City, N. J.
Carney, Francis J., 938 Park Square Bldg., Boston, Mass.
Carpenter, Jesse T., New York University, New York City.
Carpenter, W. Clayton, 400 International Trust Bldg., Denver, Colo.
Carpenter, William Boyd, No. 4 West Melrose St., Chevy Chase, Md.
Carr, J. O., 400 North Front St., Wilmington, N. C.
Carr, Wilbur J., Department of State, Washington, D. C.
Carroll, Marie J., 8 West 40th St., New York City.
Carroll, Mitchell B., 67 Broad St., New York City.
Carton, Alfred T., 33 South Clark St., Chicago, Ill.
Cassidy, Lewis, 986 Ashbury St., San Francisco, Cal.
Castro, Alfredo de, Jr., Tribunal Supremo, Habana, Cuba.

Catellani, Enrico, University of Padua, Padua, Italy.
Cemil Bey, M., Université d'Istanbul, Istanbul, Turkey.
Chacko, C. Joseph, Forman Christian College, Punjab, Lahore, India.
Chamberlain, Joseph B., Columbia University, New York City.
Chamberlin, Vell B., 1951 N. Madison St., Chicago, Ill.
Chancellor, Edgar Charles, 3 Avonmore Road, London, W. 14, England.
Chang, Tennyson P., Georgetown University, Washington, D. C.
Cheng, F. T., 37 Yi Ho Road, Shan Si Road, Nanking, China.
Cheng, S. G., 20, Tung Tang Tze Hutung, Peiping, China.
Cherrington, B. M., University of Denver, Denver, Colo.
Chilton, Robert S., Jr., Hotel Cecil, San Francisco, Calif.
Chow, S. R., National Wu-Han University, Wauchang, China.
Christensen, Henry C., Ramsey Bldg., Rochester, Minn.
Chrystie, T. Ludlow, 19 Cedar St., New York City.
Chu, Dauphin F., Gen. Ho's Headquarters, Chu Yen Tang, Peiping, China.
Chubb, H. B., 2040 Vermont St., Lawrence, Kans.
Clapp, Algernon R., 1930 Land Title Bldg., Philadelphia, Pa.
Clark, Grenville, 31 Nassau St., New York City.
Clark, J. Reuben, Jr., 80 D St., Salt Lake City, Utah.
Clark, Keith, Carleton College, Northfield, Minn.
Clinton, George, Jr., 1012 Prudential Bldg., Buffalo, N. Y.
Clyde, Paul H., University of Kentucky, Lexington, Ky.
Cock, A. Alfredo, Medellin, Colombia.
Cock, Victor, Banco de Colombia, No. 502, Bogota, Colombia.
Cohen, Benjamin, 2154 Florida Ave., Washington, D. C.
Cohen, William N., 20 Exchange Pl., New York, N. Y.
Colegrove, Kenneth, 105 Harris Hall, Evanston, Ill.
Colina, Rafael de la, 225 West 34th St., New York, N. Y.
Colladay, E. F., 1331 G St., N. W., Washington, D. C.
Collier, Charles S., Law School, University of Wisconsin, Madison, Wis.
Colombos, C. J., 1 Brick Court, Temple, E. C. 4, London, England.
Colon, Francisco A., 3625 T St., N. W., Washington, D. C.
Colvin, H. Milton, 1808 37th St., N. W., Washington, D. C.
Comstock, A. Barr, 84 State St., Boston, Mass.
Concha, Carlos, Ministerio de Relaciones Exteriores, Lima, Peru.
Conlen, William J., 1506 Packard Bldg., Philadelphia, Pa.
Connally, John W., Jr., University Club, Washington, D. C.
Conner, Benjamin H., 5, Avenue de l'Opera, Paris, France.
Conway, Thomas F., 52 Wall St., New York City.
Conyers, C. B., Brunswick, Ga.
Cook, Robert A. B., 75 Federal St., Boston, Mass.
Cooke, Ruth Edna, Apt. 3E, 606 West 115th St., New York City.
Coolidge, Laurence, 82 Devonshire St., Boston, Mass.
Cooper, John C., Jr., Chrysler Bldg., New York City.
Cooper, Wade H., 1722 Massachusetts Ave., N. W., Washington, D. C.
Cosentini, Francesco, 22 Rue de la Chaise, Paris, VIIe, France.
Coudert, Frederic R., 2 Rector St., New York City.
Cowles, Willard B., Investment Bldg., Washington, D. C.
Crandall, Samuel B., Andover, N. Y.
Cravath, Paul D., 15 Broad St., New York City.
Crecraft, Earl Willis, University of Akron, Akron, Ohio.
Cromwell, William Nelson, 12 West 49th St., New York City.
Cronkhite, Bernice Brown, 14 Appian Way, Cambridge, Mass.
Cronkhite, Leonard W., 14 Appian Way, Cambridge, Mass.
Cross, Ephraim, 1850 Andrews Ave., Bronx, New York City.
Culbertson, William S., Colorado Bldg., Washington, D. C.
Culkin, William E., 410 Court House, Duluth, Minn.
Curtis, C. B., Litchfield, Conn.
Curtis, Edward E., 16 Dover Road, Wellesley, Mass.
Cushing, Charles S., 821 Crocker First Nat'l Bk. Bldg., San Francisco, Calif.
Cutler, John Ward, 704 Southern Bldg., Washington, D. C.

Daggett, Athern P., 32 College St., Brunswick, Maine.
Dale, Ben B., 414 Walnut St., Cincinnati, Ohio.
Daly, Beverly C., Box 433, Laramie, Wyo.
D'Amours, Ernest R., 795 Elm St., Manchester, N. H.

Dangel, Edward Miron, 18 Tremont St., Boston, Mass.
Darden, Colgate W., Jr., House of Representatives, Washington, D. C.
Das, Taraknath, 1531 Park Road, Washington, D. C.
Davila, Luis Garcia, Consul of Venezuela, Philadelphia, Pa.
Davis, Guy W., Box 33, Norwood, Pa.
Davis, John W., 15 Broad St., New York City.
Deák, Francis, Columbia Law School, New York City.
Debuchi, Katsuji, 103 Tamagawa Oyamacho, Setagaya-Ku, Tokyo, Japan.
De Knight, Clarence W., Hibbs Building, Washington, D. C.
Deland, Frank S., 22 Beacon St., Boston, Mass.
Denman, William, 2 Laurel St., San Francisco, Calif.
Dennett, Tyler, Williams College, Williamstown, Mass.
Dennis, William C., 228 College Avenue, Richmond, Ind.
Desvernine, R. E., 15 Broad St., New York City.
Devine, Preston, 593 Market St., San Francisco, Calif.
Dickinson, Edwin D., University of California, Berkeley, Calif.
Dickinson, John, Department of Justice, Washington, D. C.
Dillard, Hardy C., University of Virginia, Charlottesville, Va.
Dockweiler, Henry I., 2321 S. Figueroa St., Los Angeles, Calif.
Doelle, Buell A., 520 W. Barnes Ave., Lansing, Mich.
Domke, Martin, 8, Avenue Charles Floquet, Paris, France.
Donworth, George, 512 Hoge Bldg., Seattle, Wash.
Dorsey, Harryman, 3812 Military Road, Washington, D. C.
Dulles, A. W., 48 Wall St., New York City.
Dulles, John Foster, 49 Wall St., New York City.
Dumbauld, Edward, Department of Justice, Washington, D. C.
Dumont, Frederick F., The Anchorage, Ronks, Lancaster County, Pa.
Duncan, David Shaw, 2255 South Columbine St., Denver, Colo.
Duniway, C. A., Carleton College, Northfield, Minn.
Dunn, Frederick S., Yale University, New Haven, Conn.

Eagleton, Clyde, New York University, New York City.
Eales, John I. H., 115 Sherman Ave., East, Fort Atkinson, Wis.
Earl, Charles, 120 Broadway, New York City.
Eder, Phanor J., 74 Trinity Pl., New York City.
Edmonds, Franklin S., Franklin Bldg., Philadelphia, Pa.
Edmunds, Sterling E., 1711 Liberty Central Bldg., St. Louis, Mo.
Ehrhorn, Oscar W., 280 Broadway, New York City.
Elizalde, Rafael H., Alonso Ovalle 1435, Santiago, Chile.
Elkus, Abram I., 40 Wall St., New York City.
Ellis, Ellen Deborah, Mount Holyoke College, South Hadley, Mass.
Ellis, Wade H., Southern Bldg., Washington, D. C.
Elwell, Richard E., 512–514 Investment Bldg., Washington, D. C.
Emerson, Rupert, 5 Buckingham St., Cambridge, Mass.
Emilianides, Achilles C., P. O. Box No. 190, Nicosia, Cyprus.
Engert, Cornelius Van H., c/o State Department, Washington, D. C.
Englebeck, Amos H., 2200 First Central Trust Bldg., Akron, Ohio.
Evans, Earle W., 360 North Crestway, Wichita, Kans.
Evans, Edward W., 6014 Chew St., Germantown, Philadelphia, Pa.
Evans, Luther H., 1925 16th St., N. W., Washington, D. C.
Everett, R. O., Durham, N. C.

Fabrega, G. Lopez, 90 Broad St., New York City.
Fabrega, Octavio, P. O. Box 409, Panama City, Panama.
Fachiri, Alexander, 1 King's Bench Walk, Temple, London, E. C. 4, England.
Fagen, Melvin M., 461 Fourth Ave., New York City.
Fairbanks, Joseph, 1001 15th St., N. W., Washington, D. C.
Fairman, Charles, Harvard Law School, Cambridge, Mass.
Faries, David R., 812 Pershing Square Bldg., Los Angeles, Calif.
Fay, Sidney B., 95 Widener Library, Cambridge, Mass.
Feller, A. H., Department of Justice, Washington, D. C.
Fenn, Edward, University of New Hampshire, Durham, N. H.
Fenn, Percy Thomas, 190 Elm St., Oberlin, Ohio.
Fenwick, Charles G., Bryn Mawr College, Bryn Mawr, Pa.
Ferguson, John C., 3 Hsi-Chiao Hutung, Peiping, China.
Ferry, Mansfield, 20 Exchange Pl., New York City.

Feuille, Frank, Room 4225, Rockefeller Plaza, New York City.
Fidanque, B. D., Jr., 8 Bridge St., New York City.
Finletter, Thomas K., 2 Rector St., New York City.
Fisher, Frederick C., Firestone Tire & Rubber Company, Akron, Ohio.
Fite, Katherine Boardman, 2144 Wyoming Ave., N. W., Washington, D. C.
Fitzgerald, David E., 185 Church St., New Haven, Conn.
Flannery, J. S., Hibbs Bldg., Washington, D. C.
Fleming, D. F., Vanderbilt University, Nashville, Tenn.
Fletcher, Henry P., Greencastle, Pa.
Flournoy, Richard W., Department of State, Washington, D. C.
Forbes, W. Cameron, 614 Sears Bldg., Boston, Mass.
Fosdick, Raymond P., 61 Broadway, New York City.
Foster, Y. G., 2, Hare Court, Temple E. C. 4, London, England.
Fox, Charles J., 78 Rue Pasteur, Tientsin, China.
Franck, Antoine, 30 rue des Escrimeurs, Antwerp, Belgium.
François, J., Hoogeweg 12, The Hague, Holland.
Frankham, Markley, 20 Exchange Place, New York City.
Fraser, Henry S., 617–619 City Bank Bldg., Syracuse, N. Y.
Fraser, Leon, 2 Wall St., New York City.
Fraser, R. S., 141 Moorgate, London, E. C. 2, England.
Frazer, Keener C., Chapel Hill, N. C.
Freeman, Alwyn V., 20 Chicago Boulevard, Detroit, Mich.
French, Thomas E., 106 Market St., Camden, N. J.
Freund, Heinrich, Meinekestrasse 20, Berlin W 15, Germany.
Freund, Sanford H. E., 55 Wall St., New York City.
Frey, Delmar C., 231 South La Salle St., Chicago, Ill.
Frost, E. Allen, 228 North La Salle St., Chicago, Ill.
Fry, Thomas P., University of Queensland, Brisbane, Australia.
Funk, Carl W., 1429 Walnut St., Philadelphia, Pa.
Furniss, Henry W., 56 Bainbridge Road, West Hartford, Conn.
Futrell, William H., 201 Varick St., New York City.

Gagnon, Joseph E., 3601 Conn. Ave., N. W., Washington, D. C.
Gajzago, Laszlo, Attila korut 19, Budapest, Hungary.
Gamboa, Melquiades J., University of the Philippines, Manila, P. I.
Gardiner, A. L., Houghton, Stockbridge, Hants, England.
Gardner, Leonard M., 1 Madison Ave., New York City.
Garfield, Harry A., 1529 New Hampshire Ave., Washington, D. C.
Garfield, James R., 1401 Midland Bank Bldg., Cleveland, Ohio.
Garner, James W., University of Illinois, Urbana, Ill.
Garrett, John W., 4545 Charles St., Baltimore, Md.
Gary, Hampson, Southern Bldg., Washington, D. C.
Gates, Cassius E., 611 Central Bldg., Seattle, Wash.
Gathings, James A., Landrum, S. C.
Geiser, Karl F., Oberlin College, Oberlin, Ohio.
Gennert, Henry G., 19 West 44th St., New York City.
George, Julia, 1136 Eddy St., San Francisco, Calif.
Gerardus, Sister M., St. Joseph's College for Women, Brooklyn, N. Y.
Gest, Sydney G., Pan American Union, Washington, D. C.
Gherini, Ambrose, 913 Insurance Exchange Bldg., San Francisco, Calif.
de Ghika, George, 25 Broadway, New York City.
Gibbons, John H., 1719 N St., N. W., Washington, D. C.
Gibson, Hugh S., Brussels, Belgium.
Gibson, James A., Jr., 634 South Spring St., Los Angeles, Calif.
Gibson, William M., Box 4525, Duke Station, Durham, N. C.
Gidel, Gilbert, 42 rue Molitor, Paris, XVI, France.
Gifford, James M., 60 Broadway, New York City.
Gilbert, Amy M., Elmira College, Elmira, N. Y.
Gilbert, S. Parker, 30 Sutton Pl., New York City.
Gilchrist, Huntington, 233 Salisbury House, London, E. C. 2, England.
Gill, Tom Irvin, 73 Martin St., Cambridge, Mass.
Gillis, I. V., Off Ma I Pa Hsieh Chieh, Outside Ti an Men, Peiping, China.
Gilson, John L., Probate Court Chambers, New Haven, Conn.
Glassey, Helena S., 2229 Bancroft Pl., N. W., Washington, D. C.
Goetz, Jacob H., 783 East 17th St., Brooklyn, N. Y.
Gonzales, Antonio C., Quito, Ecuador.

Gonzales, M. C., Alamo National Bldg., San Antonio, Texas.
Gonzalez, José M., Consul General of Cuba, Rotterdam, The Netherlands.
Gonzalez-Lamas, Antonio, Tetuan St., 6½, P. O. Box 107, San Juan, Puerto Rico.
Goodrich, Leland M., Brown University, Providence, R. I.
Gordon, Reuben J., Box 43, Riverdale, Md.
Graham, Malbone W., Jr., 405 Hilgard, Brentwood Heights, Los Angeles, Calif.
Graham, Samuel J., U. S. Court of Claims, Washington, D. C.
Grant, Walter B., 18 Tremont St., Boston, Mass.
Grant-Suttie, G. L. P., 30 Edmund Ave., Toronto, Ont., Canada.
Graustein, Archibald R., 220 East 42nd St., New York City.
Gray, Alan E., 1001 Title Guarantee Bldg., Los Angeles, Calif.
Green, Harry J., Baltimore Trust Bldg., Baltimore, Md.
Green, John R., Boatmen's Bank Bldg., St. Louis, Mo.
Green, Joseph C., 10 Quincy St., Chevy Chase, Md.
Greene, Roger S., 71 Lancaster St., Worcester, Mass.
Grew, Joseph Clark, c/o Department of State, Washington, D. C.
Griffin, Norman J., 1518 Walnut St., Philadelphia, Pa.
Grossman, Moses H., 521 Fifth Ave., New York City.
Grossmann, Carl G., 780 St. Marks Ave., Brooklyn, N. Y.
Guggenheim, Harry F., 120 Broadway, New York City.
Gulick, Lewis R., 302 Erie County Bank Bldg., Buffalo, N. Y.
Gunther, Franklin Mott, American Embassy, Rome, Italy.

Habicht, Max, Legal Section, Secretariat, League of Nations, Geneva, Switzerland.
Hackworth, Green H., Department of State, Washington, D. C.
Hadsell, D., 3130 Lewiston Ave., Berkeley, Calif.
Hagan, Charles B., 54 Green St., Northampton, Mass.
von Hagens, Walter, Zoppot, Bülow-Allee 11, Danzig.
Haight, Charles S., 27 William St., New York City.
Hale, William B., Room 2300, 120 West Adams St., Chicago, Ill.
Haley, Edith Dodge, 41 Dudley St., Medford, Mass.
Hall, Henry C., 2238 Que St., N. W., Washington, D. C.
Hamill, Charles H., 105 West Monroe St., Chicago, Ill.
Hammarskjold, A., Court of International Justice, The Hague, The Netherlands.
Hardin, John R., 300 Broadway, Newark, N. J.
Hardy, Charles J., 30 Church St., New York City.
Harley, J. Eugene, University of So. California, Los Angeles, Calif.
Harper, Charles J. S., 10 & 12 Bishopsgate, London, E. C. 2, England.
Harriman, Edward A., 1302 18th St., N. W., Washington, D. C.
Harrington, Gove B., 328 Convent Ave., New York City.
Harris, N. Dwight, 1134 Forest Ave., Evanston, Ill.
Hart, Albert Bushnell, 19 Craigie St., Cambridge, Mass.
Hart, James, Johns Hopkins Club, Baltimore, Md.
Hart, William L., 135 Overlook Drive, Alliance, Ohio.
Hartzo, S. A., c/o Lake Forest College, Lake Forest, Ill.
Harvey, Horace, Edmonton, Alberta, Canada.
Harvey, Lashley Grey, Adams State Teachers College, Alamosa, Colo.
Harvey, Richard W., 381 Spring Avenue, Ridgewood, N. J.
Hatfield, Henry Reed, 721 Walnut St., Philadelphia, Pa.
Hawes, Harry B., Transportation Bldg., Washington, D. C.
Hawks, Stanley, American Embassy, 2 Avenue Gabriel, Paris, France.
Hayes, L. Wendell, 1164 E. 58th St., Chicago, Ill.
Hayes, James H., 30 Rockefeller Plaza, New York City.
Hayes, W. A., 425 East Water St., Milwaukee, Wis.
Hays, Arthur Garfield, 120 Broadway, New York City.
Hazard, Henry B., 18 Rhode Island Ave., N. W., Washington, D. C.
Hazard, John N., c/o American Consulate, Moscow, U.S.S.R.
Healy, Thomas H., Sch. of Foreign Service, Georgetown College, Washington, D. C.
Heicher, Winchester H., New York University, New York City.
Heilner, Joseph J., Baker, Oregon.
Hemleben, Sylvester J., 509 West 122nd St., New York City.
Hendricks, Homer, 922 Southern Bldg., Washington, D. C.
Herriott, Frank L., Drake University, Des Moines, Iowa.
Hernandez, José Gonzalez, Salinas, Puerto Rico.
Hess, Jerome S., 74 Trinity Pl., New York City.
Hicks, R. Randolph, 49 Wall St., New York City.

Hill, Chesney, University of Missouri, Columbia, Mo.
Hill, Norman L., University of Nebraska, Lincoln, Nebr.
Hill, Ralph W. S., 3327 N St., N. W., Washington, D. C.
Hinckley, Frank E., Merchants Exchange, San Francisco, Calif.
Hindmarsh, A. E., 43 Linnaean St., Cambridge, Mass.
Hinke, Erich, Nollendorfplatz 7, Berlin W 30, Germany.
Hinkley, John, 215 N. Charles St., Baltimore, Md.
Hirsch, Harold, 1045 Hurt Bldg., Atlanta, Ga.
Hitchcock, George C., 809 Federal Commerce Trust Bldg., St. Louis, Mo.
Hoffmann, Willy, Thomaskirchhof 21, 111, Leipzig, C.1, Germany.
Holden, Alice M., Smith College, Northampton, Mass.
Hollister, Evan, 810 M & T Bldg., Buffalo, N. Y.
Hooley, O. E., Agricultural and Mechanical Coll., Stillwater, Okla.
Holt, Harold Wright, University of Illinois, Urbana, Ill.
Horan, Michael J., 291 Broadway, New York City.
Hornbeck, Stanley K., Cosmos Club, Washington, D. C.
Horovitz, Samuel B., 33 Elm St., Wakefield, Mass.
Houghton, A. B., 3003 Massachusetts Ave., N. W., Washington, D. C.
Houston, Oscar, 99 John St., New York City.
Howard, L. Vaughan, Williamsburg, Va.
Hrabar, V. E., Zubovski, 15, Moscow, U.S.S.R.
Hsia, Ching Lin, 839 Connaught Road, Shanghai, China.
Hsiao Pu, 5826 Third St., N. W., Washington, D. C.
Hubbard, Clifford C., Wheaton College, Norton, Mass.
Hudson, Manley O., Harvard Law School, Cambridge, Mass.
Hughes, Charles E., 2223 R St., N. W., Washington, D. C.
Hull, William I., Swarthmore College, Swarthmore, Pa.
Hunt, Bert L., Department of State, Washington, D. C.
Hunt, Edgar W., Byroad Farm, Lambertville, N. J.
Hunter, S. A. Dulany, School of Foreign Service, Georgetown University, Washington, D. C.
Hurst, Cecil J. B., Permanent Court of Internatl. Justice, The Hague, Holland.
Hyde, Charles Cheney, Columbia University, New York City.

Isaacs, Lewis M., 475 Fifth Ave., New York City.
Idman, K. G., Place Napoleon 3, Varsovie, Poland.
Ion, Theodore P., 357 Halsey St., Brooklyn, N. Y.

Jackson, Robert H., 24 Bank of Jamestown Bldg., Jamestown, N. Y.
Jackson, William K., 1 Federal St., Boston, Mass.
Jacoby, Sidney B., 304 West 92nd St., New York City.
James, Eldon R., 114 Brattle St., Cambridge, Mass.
Janne, Xavier, 10, rue de la Banque, Verviers, Belgium.
Jenks, C. Wilfred, International Labour Office, Geneva, Switzerland.
Jennings, Oliver G., 52 Vanderbilt Ave., New York City.
Jensen, Christen, 593 North University Ave., Provo, Utah.
Jessup, Philip C., Columbia University, New York City.
Jobst, Valentine, III, 704 W. University, Champaign, Ill.
Johnson, Claudius O., State College of Washington, Pullman, Wash.
Johnson, E. Bert, 340 Main St., Worcester, Mass.
Johnson, I. C., Naval Torpedo Station, Newport, R. I.
Johnson, Walter, 243 N. Barton St., Clarendon, Va.
Jones, Amy Heminway, 405 West 117th St., New York City.
Jones, John C., Jr., 53 State St., Boston, Mass.
Judd, Orrin G., 234 Washington Ave., Brooklyn, N. Y.

Kaeckenbeeck, Georges, Schirdsgerichts fur Oberschlesien, Beuthen, O-S, Germany.
Kalijarvi, Thorsten, University of New Hampshire, Durham, N. H.
Kaplan, Jacob J., 161 Devonshire St., Boston, Mass.
Kassan, Shalom, P. O. Box 1018, Jerusalem, Palestine.
Keatley, G. Harold, 3145 16th St., N. W., Washington, D. C.
Keedy, Edwin R., University of Penn., Philadelphia, Pa.
Kegley, W. B., Wytheville, Va.
Kelchner, Warren H., Department of State, Washington, D. C.
Kelley, Robert F., Department of State, Washington, D. C.
Kellogg, Frank B., First National Bank Bldg., St. Paul, Minn.

Kenyon, Dorothy, 51 East 42nd St., New York City.
Kertész, Stephen, Yale Law School, New Haven, Conn.
Ketcham, Earle H., Syracuse University, Syracuse, N. Y.
Key, Luella Gettys, 726 Jackson Pl., N. W., Washington, D. C.
Kiang, Yi-seng S., 552 Chamber of Commerce Bldg., Los Angeles, Calif.
Kiep, O. C., Tauberstr. 15, Berlin-Grunewald, Germany.
Killeen, Henry W., 1020 Ellicott Square, Buffalo, N. Y.
Kimball, Chase, 175 Grove St., Waterbury, Conn.
King, Archibald, Hdqrs., Fourth Corps Area, U. S. Army, Old Post Office Bldg., Atlanta, Ga.
King, George A., 728 17th St., Washington, D. C.
Kingsbury, Howard Thayer, 2 Rector St., New York City.
Kirkwood, K. P., Canadian Legation, Tokyo, Japan.
Klots, Allen T., 32 Liberty St., New York City.
Knauer, Fred J., 8546 110th St., Richmond Hill, N. Y.
Knudson, John, 99 Livingston St., Brooklyn, N. Y.
Komar, Borris H., 475 Fifth Ave., New York City.
Kooiman, P. J., 99 John St., New York City.
Korovin, Eugene A., Mashkoff Per. 10, Kv. 18, Moscow, U.S.S.R.
Kosters, J., 76 Ruychrockstraat 76, The Hague, Holland.
Kottman, William A., 34 Elston Road, Upper Montclair, N. J.
Kraft, C. Theodore, 34 Irving St., Cambridge, Mass.
Kraus, Herbert, Merkelstrasse 11, Göttingen, Germany.
Kunz, Josef L., 3002 West Bancroft St., Toledo, Ohio.
Kuhn, Arthur K., Room 2651, 120 Broadway, New York City.

Ladas, Stephen P., 17 John St., New York City.
Laing, Lionel H., Williamsburg, Va.
Lambie, Margaret, 1661 Crescent Pl., N. W., Washington, D. C.
Lane, Arthur Bliss, Department of State, Washington, D. C.
Lane, Merritt, Law Court Bldg., Newark, N. J.
Lashly, Jacob M., 705 Olive St., St. Louis, Mo.
Lathrop, Mary Florence, Equitable Bldg., Denver, Colo.
Latimer, J. L., Office of the Judge Advocate General, Navy Department, Washington, D. C.
Laughlin, H. H., Cold Spring Harbor, Long Island, N. Y.
Laukhuff, Perry, Sweet Briar, Va.
Lauterpacht, H., London School of Economics and Political Science, London, W. C. 2, England.
Laves, Walter H. C., 75 East Wacker Drive, Chicago, Ill.
Lawler, Oscar, 800 Standard Oil Bldg., Los Angeles, Calif.
Leahy, Francis T., 40 Court St., Boston, Mass.
Lee, Blewett, 355 Peachtree Battle Ave., Atlanta, Ga.
Lee, Frederic P., 6915 Glenbrook Road, Bethesda, Md.
Leebrick, K. C., Syracuse University, Syracuse, N. Y.
Lefevre, Charles H., Hibbs Bldg., Washington, D. C.
Le Fur, Louis, 15 Rue Duguay-Trouin, Paris (VIe), France.
Lehman, Irving, Court of Appeals, Albany, N. Y.
Lemann, Monte M., New Orleans, La.
Lenoir, J. J., Longview, Ill.
Leon, Maurice, 44 Wall St., New York City.
LeRoy, Howard S., Colorado Bldg., Washington, D. C.
Lese, Harold Vincent, 439 Investment Bldg., Washington, D. C.
Leveroni, Frank, 73 Tremont St., Boston, Mass.
Lévitt, Albert, District Court, St. Thomas, Virgin Islands.
Lewis, Robert E., 55 Nottingham Rd., Rockville Center, L. I., N. Y.
Lien, Arnold J., Washington University, St. Louis, Mo.
Lilly, Linus A., 3642 Lindell Boulevard, St. Louis, Mo.
Lima, Sister Rose de, College of Saint Elizabeth, Convent Station, N. J.
Lindsay, Ronald C., British Embassy, Washington, D. C.
Lindsay, Edward, Warren Nat. Bk. Bldg., Warren, Pa.
Linebarger, Paul M. A., 2006 R St., N. W., Washington, D. C.
Lissitzyn, Oliver J., 1046 Amsterdam Ave., New York City.
Little, Herbert S., 710 Smith Tower, Seattle, Wash.
Liu, E. G., Chowpu, Shanghai, China.
Liu, Pinghou C., 195 Claremont Ave., New York City.

Llewellyn-Jones, F., Isfryn, Mold, N. Wales.
Lobingier, Charles L., 2002 P. St., N. W., Washington, D. C.
Lockey, Joseph B., Univ. of Calif. at Los Angeles, Los Angeles, Calif.
Loewenfeld, Erwin, Rathenowerstrasse 78, Berlin, NW, 21, Germany.
Loewenstein, Karl, Yale University, New Haven, Conn.
Loftin, Scott M., P. O. Box 509, Jacksonville, Fla.
Long, Breckinridge, Montpelier Manor, Laurel, Md.
Longyear, Robert Dudley, 6, Place St-Ferreol, Marseille, France.
Lord, George DeForest, 25 Broadway, New York City.
Loring, William C., Jr., 167 West 12th St., New York City.
Lundborg, Ragner, Vallingatan 12, Stockholm, Sweden.
Lynskey, Elizabeth M., Hunter College of the City of N. Y., New York City.

McChesney, Nathan William, 30 North La Salle St., Chicago, Ill.
McClellan, William, Potomac Electric Power Company, 10th & E St., N. W., Washington, D. C.
McClennen, Edward F., 161 Devonshire St., Boston, Mass.
McClure, Wallace, 2145 C St., N. W., Washington, D. C.
McCornack, Willard F., 14 Occom Ridge, Hanover, N. H.
McCreery, Fenton R., 526 Beach St., Flint, Mich.
McDarment, Corley P., Rodgers Field, Sharpsburg Br., Pittsburgh, Pa.
McDonald, Charles S., 1556 Penobscot Bldg., Detroit, Mich.
McDonald, John J., Shoreham Bldg., Washington, D. C.
McDougall, Archibald, Ministry of Foreign Affairs, Bagdad, Iraq.
McEntire, Davis, 1422 Massachusetts Ave., S. E., Washington, D. C.
McKenna, Charles H., Blackfriars, Oxford, England.
McKenney, Frederic I., Hibbs Bldg., Washington, D. C.
McKernan, Louis W., 2683 15th St., N. W., Washington, D. C.
McKibbin, Harry Clinton, Apartado Postal 1328, Bogota, Colombia.
McMurray, Orrin K., 2357 Le Conte Ave., Berkeley, Calif.
McNair, Arnold D., Gonville & Caius College, Cambridge, England.
MacChesney, Brunson, Kirkland House, Cambridge, Mass.
MacChesney, Nathan William, 30 North La Salle St., Chicago, Ill.
Macdonald, H. Malcolm, Harvard University, Cambridge, Mass.
MacGuire, D. Clarke, 412 S. Occidental Boulevard, Los Angeles, Calif.
Machado y Ortega, Luis, 19 Obrapia St., Havana, Cuba.
MacIntyre, Marie D., 46 Porter St., Somerville, Mass.
Mack, Julian W., Woolworth Bldg., New York City.
MacKenzie, N. A. M., University of Toronto, Toronto, Canada.
MacLean, Donald A., Catholic University of America, Washington, D. C.
MacMurray, J. V. A., c/o Department of State, Washington, D. C.
MacWhite, Michael, 1800 Conn. Ave., N. W., Washington, D. C.
Magnusson, Leifur, 734 Jackson Pl., N. W., Washington, D. C.
Maktos, John, Department of State, Washington, D. C.
Mallet-Prevost, S., 63 Wall St., New York City.
Manice, William DeForest, 31 Nassau St., New York City.
Mann, Frederick Justin, 1203 Beverly Road, Brooklyn, N. Y.
Manning, W. R., Department of State, Washington, D. C.
Manton, Martin T., U. S. Circuit Court of Appeals, New York City.
Marburg, Theodore, 14 W. Mt. Vernon Pl., Baltimore, Md.
Marcy, William L., Jr., 302 Erie County Bank Bldg., Buffalo, N. Y.
Marshall, Cloud R., Union Trust Bldg., Washington, D. C.
Martin, Charles E., University of Washington, Seattle, Wash.
Martin, Clarence E., Martinsburg, West Va.
Martin, Paul, 607 Security Bldg., Windsor, Canada.
Martin, Wesley, Webster City, Iowa.
Marvin, David G., 20 A Prescott St., Cambridge, Mass.
Marvin, Langdon Parker, 52 Wall St., New York City.
Mason, Lester B., 227 N. Washington St., Herkimer, N. Y.
Masters, Ruth D., c/o H. G. Rickover, U.S.N., San Pedro, Calif.
Masterson, W. E., University of Mo., Columbia, Mo.
Mather, Thomas T., Jr., 294 Montgomery St., Bloomfield, N. J.
Matre, Joseph B., 1111 Summerfield Rd., Silver Spring, Md.
Matson, Frederick George, 4505 Park Ave., Indianapolis, Ind.
Matsuda, Michikazu, The Foreign Office, Tokyo, Japan.
Mattern, Johannes, Johns Hopkins University, Baltimore, Md.

Matthews, Burnita S., 635 Southern Bldg., Washington, D. C.
Matthews, John M., 417 Lincoln Hall, Urbana, Ill.
Matthews, M. Alice, 700 Jackson Pl., N. W., Washington, D. C.
Matusinski, Jerzy, 149 East 67th St., New York City.
Maùrtua, Victor M., Calle Quilca 217, Lima, Perù.
Maverick, Maury, House Office Building, Washington, D. C.
Medgyesy, László, 201 N. Wells St., Chicago, Ill.
Mellish, H., 31 Hollis St., Halifax, N. S., Canada.
Mello, Rubens de, Ministerio de Exterior, Rio de Janeiro, Brazil.
Metzger, Jacob A., Department of State, Washington, D. C.
Metzler, Edward L., Investment Bldg., Washington, D. C.
Middlebush, Frederick A., 218 Edgewood Ave., Columbia, Mo.
Milbank, Albert G., 15 Broad St., New York City.
Millar, Moorhouse F. X., Fordham University, Fordham, N. Y.
Miller, David Hunter, Department of State, Washington, D. C.
Miller, Sidney T., 3456 Penobscot Building, Detroit, Mich.
Mintz, Herman A., 1 State St., Boston, Mass.
Miranda Jordão, Edmundo de, Praca Maua 7, Rio de Janeiro, Brazil.
Mitchell, James McC., 1330 Marine Trust Bldg., Buffalo, N. Y.
Mitchell, Nicholas P., University of Richmond, Richmond, Va.
Moffat, Jay Pierrepont, Department of State, Washington, D. C.
Mohr, Edward J., 154 Nassau St., New York City.
Momsen, Richard P., Caixa do Correio, 1698, Rio de Janeiro, Brazil.
Monsman, Gerald, 415 Investment Bldg., Washington, D. C.
Montalvan, Salvador Guerrero, Managua, Nicaragua.
Moore, John Bassett, Room 305, Library, Columbia University, New York City.
Moore, Robert Lee, 600 West 174th St., New York City.
Mootham, O. H., 10, Phayne St., Rangoon, Burma, India.
Mori, Kenkichi, The Imperial Japanese Delegation, Hsinking, Manchuria.
Moriwake, Ernest K., 500 Fifth Ave., New York City.
Morris, Henry C., 3006 Albemarle St., Washington, D. C.
Morris, Robert C., 76 William St., New York City.
Morris, Roland S., 1617 Land Title Bldg., Philadelphia, Pa.
Morrison, Phoebe, 312 Sterling Law Building, New Haven, Conn.
Mount, Russell T., 27 William St., New York City.
Mower, Edmund C., Burlington, Vt.
Mui, King-Chau, Chinese Consulate, Honolulu, Hawaii.
Murdock, James O., 1824 23rd St., N. W., Washington, D. C.
Murphy, Lionel V., Farm Credit Administration, Washington, D. C.
Murray, George Wellwood, 15 Broad St., New York City.
Myer, Walter E., 744 Jackson Pl., N. W., Washington, D. C.
Myers, Denys P., 40 Mt. Vernon St., Boston, Mass.
Myres, S. D., Jr., Southern Methodist University, Dallas, Texas.

Nagel, Charles, Security Bldg., St. Louis, Mo.
Nebolsine, George, 63 Wall St., New York City.
Neeld, George Avery, St. Johnsbury, Vt.
Neff, Harold H., Securities and Exchange Commission, Washington, D. C.
Newbury, George A., 810–826 M & T Bldg., Buffalo, N. Y.
Newlin, Algie I., Guilford College, N. C.
Nicol, Roderick M., 116 W. Regent St., Glasgow, Scotland.
Nielsen, Fred K., The Cairo, Washington, D. C.
Nippert, Alfred K., 2116 Union Central Bldg., Cincinnati, Ohio.
Noble, G. Bernard, Reed College, Portland, Oregon.
Norem, Ralph A., University of California at Los Angeles, Los Angeles, Calif.
Noxon, John F., Jr., 28 North St., Pittsfield, Mass.
Nutter, George R., 8 West Cedar St., Boston, Mass.

O'Brien, Morgan J., 39 Broadway, New York City.
Oehlert, B. H., Jr., 5908 Nevada Ave., Chevy Chase, D. C.
Ogdon, Montell E., Texas Technological College, Lubbock, Texas.
Ogg, Frederick A., 1715 Kendall Ave., Madison, Wis.
Olazabal, Manuel A. de, 728 South Hill St., Los Angeles, Calif.
Olson, Julius J., 224 State Capitol, St. Paul, Minn.
O'Neill, Anna A., 1326 New Hampshire Ave., N. W., Washington, D. C.
Overacker, Louise, Wellesley College, Wellesley, Mass.

Owen, Roberts B., 1 State St., Boston, Mass.

Packard, Richard M., 65 Blake Rd., Brookline, Mass.
Padelford, Norman J., Hamilton, N. Y.
Padoux, Georges, 54 Tunsin Road, Shanghai, China.
Pajus, Jean, 3401 Clay St., San Francisco, Calif.
Palen-Klar, A. J., 920 Fifth Ave., New York City.
Palmer, Bradley W., 53 State St., Boston, Mass.
Palmieri, Edmund L., 150 Ocean Parkway, Brooklyn, N. Y.
Pan, Stephen Chao-Yin, Catholic University, Washington, D. C.
Parker, A. Warner, Union Trust Building, Washington, D. C.
Parker, Chauncey G., 602 Southern Bldg., Washington, D. C.
Parker, John J., U. S. Circuit Court of Appeals, Charlotte, N. C.
Parkins, Albina L., 1901 Wyoming Ave., N. W., Washington, D. C.
Parks, E. T., College Station, Berea, Ky.
Parra, Antonio, Casilla No. 758, Guayaquil, Ecuador.
Parrott, Robert P., 806 15th St., N. W., Washington, D. C.
Partridge, Frank C., Proctor, Vt.
Patterson, Jefferson, Nobelsgate 28, Oslo, Norway.
Payne, Jason E., Vermillion, S. D.
Peake, J. F., Randolph-Macon Women's College, Lynchburg, Va.
de Pena, Hugo V., Legacion del Uruguay, Mexico, D. F., Mexico.
Perez, Angel, Department of State, Habana, Cuba.
Pérez, Jesús Y., Kabankalan, Occidental, Negros, P. I.
Pergler, Charles, National University Law School, Washington, D. C.
Perkins, Howard C., Findlay College, Findlay, Ohio.
Perkins, Thomas N., 50 Federal St., Boston, Mass.
Perret, Robert, One Wall St., New York City.
Peters, James W. S., 1832 Connecticut Ave., Washington, D. C.
Pfankuchen, Llewellyn, University of Wisconsin, Madison, Wis.
Phillips, William, Department of State, Washington, D. C.
Pierce, Myron E., 6 Bancroft Road, Wellesley Hills, Mass.
Pierrepont, Seth Low, Ridgefield, Conn.
Pipkin, Charles W., Louisiana State University, Baton Rouge, La.
Pitamic, Leonide, Palmoticeva 17/ii, Zagreb, Yugoslavia.
Pittman, Key, United States Senate, Washington, D. C.
Plesch, Arpad, 2, Boulevard Suchet, Paris XVI, France.
Politis, N., 17 Rue Auguste Vacquerie, Paris, France.
Polk, Winifred D., 117 Waverly Pl., New York City.
Polk, Frank L., 15 Broad St., New York City.
Pollak, Walter H., 74 Trinity Pl., New York City.
Poole, DeWitt C., Princeton, N. J.
Porter, Kirk H., 301 Richards St., Iowa City, Iowa.
Potter, Charles F., 565 Allendale Road, Pasadena, Calif.
Potter, D. Roland, 253 Senate Office Bldg., Washington, D. C.
Pound, Roscoe, Harvard Law School, Cambridge, Mass.
Preuss, Lawrence, University of Michigan, Ann Arbor, Mich.
Price, William Jennings, Cosmos Club, Washington, D. C.
Prochnik, Edgar L. G., 2343 Mass. Ave., N. W., Washington, D. C.
Pugsley, Chester DeWitt, Peekskill, N. Y.

Quail, Frank A., 1525 Guardian Bldg., Cleveland, Ohio.
Quigley, Harold S., University of Minnesota, Minneapolis, Minn.
Quinn, Arthur L., 2109 O Street, N. W., Washington, D. C.

Rabb, Albert L., 115 N. Pennsylvania Street, Indianapolis, Ind.
Ralston, Jackson H., Corner Lincoln & Cowper Sts., Palo Alto, Calif.
Ramsey, Russell A., King, Ramsey & Flynn, Sandusky, Ohio.
Ranck, Samuel H., Public Library, Grand Rapids, Mich.
Ransom, William L., 40 Wall St., New York City.
Raphael, C. G., 2809 O St., N. W., Washington, D. C.
Read, Horace E., University of Minnesota, Minneapolis, Minn.
Recinos, Adrian, 1614 18th St., N. W., Washington, D. C.
Redlich, Joseph, Armbrustergasse 15, Vienna XIX, Austria.
Reeves, Jesse Siddall, University of Michigan, Ann Arbor, Mich.
Reid, Helen Dwight, College of Arts & Sciences, Buffalo, New York.

Reinhardt, George Frederick, 2001 North Kansas Ave., El Paso, Texas.
Reno, Lawson, University of California, Berkeley, Calif.
Reuschlein, Harold G., Law School, Georgetown Univ., Washington, D. C.
Reyes-Guerra, Antonio, San Salvador, El Salvador.
Reynolds, Floyd T., 80 Summer St., Providence, R. I.
Rice, Cleaveland J., 129 Church St., New Haven, Conn.
Rice, William Gorham, Jr., 3, rue du Mont Blanc, Geneva, Switzerland.
Richards, Robert W., 4060 duPont Bldg., Wilmington, Del.
Riches, Cromwell A., Goucher College, Baltimore, Md.
Riddle, J. W., Farmington, Conn.
Riegelman, Carol, 375 Park Ave., New York City.
Riker, Samuel, 19 Cedar St., New York City.
Rives, F. Bayard, 31 Nassau St., New York City.
Robinson, Henry M., P. O. Box 453, Pasadena, Calif.
Robinson, John B., 52, Avenue des Champs Elysées, Paris, France.
Robinson, William A., Dartmouth College, Hanover, N. H.
Roden, Albert A., Denison University, Granville, Ohio.
Rodenbeck, Adolph J., 739 Powers Bldg., Rochester, N. Y.
Rodgers, William L., 1738 R St., N. W., Washington, D. C.
Rodríguez, Mario A., 2154 Florida Ave., N. W., Washington, D. C.
Rogers, James Grafton, Yale University, New Haven, Conn.
Rogers, Lindsay, Columbia University, New York City.
Rohrlich, Chester, 20 Pine St., New York City.
Romero, Jose, 2a, San Juan Letran, 29, Mexico, D. F., Mexico.
Ronhovde, A. G., Rutgers University, New Brunswick, N. J.
Root, Elihu, 31 Nassau St., New York City.
Root, Elihu, Jr., 31 Nassau St., New York City.
Rosenberg, Louis James, 1706 Penobscot Bldg., Detroit, Mich.
Rowe, L. S., Pan-American Union, Washington, D. C.
Rowell, Milo, Jr., P. O. Box 545, Fresno, Calif.
Roudybush, Franklin, 3034 P St., N. W., Washington, D. C.
Rubinstein, Louis Baruch, Investment Building, Washington, D. C.
Rublee, George, 701 Union Trust Bldg., Washington, D. C.
Rugg, Arthur P., 488 Mt. Pleasant St., Worcester, Mass.
Rugg, Charles B., 50 Federal St., Boston, Mass.
Ryden, George H., University of Delaware, Newark, Del.

Sack, A. N., New York University School of Law, New York City.
Sackett, Frederic M., 1706 Inter-Southern Bldg., Louisville, Ky.
Saito, Hirosi, 2514 Massachusetts Avenue, N. W., Washington, D. C.
Sanborn, Frederic R., 19 Grace Court, Brooklyn, N. Y.
Sandifer, Durward V., 118 Philadelphia Ave., Takoma Park, D. C.
Savage, Carlton, Department of State, Washington, D. C.
Sayre, Francis B., Department of State, Washington, D. C.
Schaffner, Arthur B., 120 S. La Salle St., Chicago, Ill.
Schindel, John R., 1318 Union Central Life Bldg., Cincinnati, Ohio.
Schindler, C. E. Dietrich, Zollikon near Zurich, Switzerland.
Schlesinger, Amanda, 640 Sutter St., San Francisco, Calif.
Schoenrich, Otto, 63 Wall St., New York City.
Schuman, Fred Lewis, University of Chicago, Chicago, Ill.
Schuster, Edward, 1 Cedar St., New York City.
Schwarz, John, 402 N. Main St., Bowling Green, Ohio.
Schwarz, Sanford, 2024 R St., N. W., Washington, D. C.
Scott, Samuel B., 826 Commercial Trust Bldg., Philadelphia, Pa.
Scully, W. A., Army & Navy Club, Washington, D. C.
Seabury, Samuel, 120 Broadway, New York City.
Searcy, Hubert, Birmingham-Southern College, Birmingham, Ala.
Sears, Charles B., City and County Hall, Buffalo, N. Y.
Seckler-Hudson, Catheryn, 3726 Connecticut Ave., N. W., Washington, D. C.
Shaner, M. P., 443 Investment Bldg., Washington, D. C.
Shaw, G. Howland, 73 Tremont St., Boston, Mass.
Sherbondy, Donald, Investment Bldg., Washington, D. C.
Sherrill, Charles H., 20 East 65th St., New York City.
Shidehara, K., 71, Komagome Kamifujimaecho, Hongo, Tokyo, Japan.
Shotwell, James T., 405 West 117th St., New York City.
Sichel, Sigmund, 2636 Yale Station, New Haven, Conn.

Sicilianos, D., 1520 20th St., N. W., Washington, D. C.
Sifre, Jaime, Jr., San Juan, Puerto Rico.
Silin, Isaac J., 1424 Erie Trust Bldg., Erie, Pa.
Silvanie, Haig, 910 Summit Avenue, Bronx, New York City.
Sinclair, Mrs. J. W., Box 238, Warrenton, Va.
Singer, B., 28 E. Jackson Boulevard, Chicago, Ill.
Skinner, Robert P., 602 Chestnut St., Massillon, Ohio.
Skvirsky, Boris E., 1119 Sixteenth St., N. W., Washington, D. C.
Smedley, Frederic C., 11 East Main St., Waterbury, Conn.
Smith, E. C., New York University, New York City.
Smith, Lawrence M. C., Sherraden, Strafford, Chester County, Pa.
Smith, Stanley P., Shoreham Bldg., Washington, D. C.
Smithers, William W., 1222–28 Bankers Trust Bldg., Philadelphia, Pa.
Snyder, Bessie M., 601 Green St., Greensburg, Pa.
Spalding, Lyman A., 57 William St., New York City.
Spencer, Henry R., 215 West 10th Ave., Columbus, Ohio.
Spencer, John H., Aux Affaires Étrangéres, Addis Ababa, Ethiopia.
Spykman, Nicholas J., Yale University, New Haven, Conn.
Stanfield, Theodore, 151 Central Park West, New York City.
Stanwood, Daniel C., 165 Main Street, Brunswick, Maine.
Stark, Richard Salisbury, 15 Van Nest Pl., New York City.
Stearns, Perry J., 927 Wells Bldg., Milwaukee, Wis.
Stecher, Karl, Univ. of Louisville, Louisville, Ky.
Steele, Thomas M., 42 Church St., New Haven, Conn.
Steinberg, Morton, Investment Bldg., Washington, D. C.
Steiner, H. Arthur, University of California, Los Angeles, Calif.
Stewart, Irvin, 401 23rd St., N. W., Washington, D. C.
Stewart, Mary E., 7532 Rogers Ave., Highland Park, Upper Darby, Pa.
Stimson, Henry L., 32 Liberty St., New York City.
Stone, Raymond, 11 Murray Avenue, Annapolis, Md.
Stowell, Ellery C., 1901 F St., N. W., Washington, D. C.
Strachan, William M., 56 W. William St., Delaware, Ohio.
Straus, Dorothy, 51 East 42nd St., New York City.
Strawn, Silas H., 1400 1st Nat. Bk. Bldg., Chicago, Ill.
Streater, Wallace, 1657 31st St., N. W., Washington, D. C.
Stuart, Graham H., Stanford University, Calif.
Such, Miguel, Box 1415, San Juan, Puerto Rico.
Summerlin, G. T., c/o State Department, Washington, D. C.
Sunderland, Edwin S., 15 Broad St., New York City.
Sutherland, George, U. S. Supreme Court, Washington, D. C.
Sweetser, Arthur, League of Nations, Geneva, Switzerland.
Swenson, Samuel Warren, University of Oklahoma, Norman, Okla.

Tachi, Sakutaro, 57 Gotanda Gochomé, Shinagawa Ward, Tokyo, Japan.
Taft, Henry W., 76 William St., New York City.
Tamm, Hugo de, P. O. Box 2125, Istanbul, Turkey.
Tanger, Jacob, Pennsylvania State College, State College, Pa.
Tanzer, Laurence Arnold, 165 Broadway, New York City.
Taracouzio, T. A., Harvard Law Library, Cambridge, Mass.
Tayler, William Lonsdale, Woodstock Valley, Conn.
Taylor, Francis E., Pershing Square Bldg., New York City.
Taylor, Paul B., 420 West 119th St., New York City.
Taylor, William M., 801 North Ramden Drive, Beverly Hills, Calif.
Telders, B. M., Rapenburg 50, Leyden, The Netherlands.
Temple, H. W., Washington, Pa.
Teran, Oscar, 36 4th St., Panama City, Panama.
Thacher, Archibald G., 72 Wall St., New York City.
Thacher, Thomas D., 120 Broadway, New York City.
Thatcher, Max B., 445 Jacaranda St., Fullerton, Calif.
Thayer, Lucius E., 60 State St., Boston, Mass.
Thelen, Max, 136 Alvarado Road, Berkeley, Calif.
Thiesing, Theodore H., 63 Wall St., New York City.
Thomas, Elbert D., Senate Office Bldg., Washington, D. C.
Thomas, Julian M., 120, Avenue des Champs Elysées, Paris, France.
Thomson, Irving L., Box 31, Rosslyn, Va.
Thorne, Samuel, 20 Exchange Pl., New York City.

Tillman, A. M., 1901 Wyoming Ave., N. W., Washington, D. C.
Timlin, Bartholomew, St. Bonaventure P. O., N. Y.
Timm, Charles A., University of Texas, Austin, Texas.
Tobin, Harold J., Hanover, N. H.
Tomlinson, John D., Wabash College, Crawfordsville, Ind.
Toro, Emilio del, Supreme Court, San Juan, Puerto Rico.
Torriente, Cosme de la, Malecon 90, Habana, Cuba.
Townsend, Dallas S., 120 Broadway, New York City.
Trautwein, Dorothy, 10 Boxford Terrace, West Roxbury, Mass.
Trimble, E. G., University of Kentucky, Lexington, Ky.
Trumbull, Donald S., 134 S. La Salle St., Chicago, Ill.
Tryon, James L., Mass. Institute of Technology, Cambridge, Mass.
Tsang, Wei Sang, 422 East Huron St., Ann Arbor, Mich.
Tsui, Shu-chin, Central Political Institute, Nanking, China.
Tuchler, Julius F., 1151 N. Kingsley Drive, Los Angeles, Calif.
Tucker, George Edwin, 2a Kiukiang Rd., Shanghai, China.
Turck, Charles J., Centre College, Danville, Ky.
Turkel, Harry R., Department of State, Washington, D. C.
Turlington, Edgar, Union Trust Bldg., Washington, D. C.
Turner, Samuel Eppes, c/o West Publishing Company, St. Paul, Minn.
Tutherly, William, Army and Navy Club, Washington, D. C.

Udy, Stanley H., 72 Fifth Ave., New York City.
Ullein, Antal, Nacar Sefareti, Istanbul, Turkey.
Ulloa, Alberto, Apartado de Correo 128, Lima, Peru.
Ulsh, Ralph, 88 Ruskin Road, Eggertsville, N. Y.
Unden, Osten, Upsala, Sweden.
Untermeyer, Samuel, 30 Pine St., New York City.
Urrutia, Francisco José, 6 Rue Jean Goujon, Paris, France.

Vallance, William R., State Department, Washington, D. C.
Vallotton, James, 2 rue du Midi, Lausanne, Switzerland.
Vance, John T., Jr., Library of Congress, Washington, D. C.
Vandenbosch, A., University of Kentucky, Lexington, Ky.
Van Deventer, Horace, Brighton Hotel, Washington, D. C.
Van Koughnet, Donald E., 2125 Scudder St., St. Paul, Minn.
Varela, Jacobo, Avenida 19 de abril 3417, Montevideo, Uruguay.
Vilkomerson, Elizabeth F., 245 Broadway, New York City.
Vinacke, Harold M., University of Cincinnati, Cincinnati, Ohio.
Viti, Marcel A., 2129 Spruce St., Philadelphia, Pa.
Vlachos, Andrew J., 127 North Dearborn St., Chicago, Ill.
Vournas, George C., Investment Bldg., Washington, D. C.
Vreeland, Hamilton, Jr., 1107 Sixteenth St., N. W., Washington, D. C.

Wadsted, Otto, 1620 Belmont St., N. W., Washington, D. C.
Waldkirch, E. V., Zeitlockenlaube 2, Berne, Switzerland.
Walker, Burnett, 31 Nassau St., New York City.
Walker, Walter B., 165 Broadway, New York City.
Walker, Wyndham Legh, 1 Salisbury Villas, Station Road, Cambridge, England.
Walls y Merino, Manuel, 700 Jackson Pl., Washington, D. C.
Walp, Paul K., Marshall College, Huntington, W. Va.
Wambaugh, Eugene, 22 Berkeley St., Cambridge, Mass.
Wambaugh, Sarah, 22 Berkeley St., Cambridge, Mass.
Warren, Charles, 1527 Eighteenth St., Washington, D. C.
Warren, John L., 1 Federal St., Boston, Mass.
Watrous, George D., 205 Church St., New Haven, Conn.
Wattles, Warren F., Department of Justice, Washington, D. C.
Way, Royal Brunson, Beloit College, Beloit, Wis.
Weiman, Carlos F., Conant Hall 26, Cambridge, Mass.
Wengert, Eugene, 231 W. Wisconsin Ave., Milwaukee, Wis.
Wesley, C. S., 1420 Chestnut St., Philadelphia, Pa.
Westphal, Albert C. F., 170 Claremont Ave., New York City.
Whelan, Ralph, 539 Plymouth Bldg., Minneapolis, Minn.
White, Howard, 112 S. Campus, Oxford, Ohio.
White, Lyman C., 1010 Woodlawn, Iowa City, Iowa.
White, Thomas Raeburn, 1930 Land Title Bldg., Philadelphia, Pa.

White, Wilbur W., Western Reserve University, Cleveland, Ohio.
Whiteley, James Gustavus, 223 West Lanvale St., Baltimore, Md.
Whiteman, Marjorie, 1812 K Street, N. W., Washington, D. C.
Whitman, Allan H., Harvard College Library, Cambridge, Mass.
Whitton, John B., 22 Place St. Andre-des-Arts, Paris, France.
Wickser, Philip J., 451 Main St., Buffalo, N. Y.
Wight, Delano, 35 Congress St., Boston 9, Mass.
Wilcox, Bertram F., 49 Wall St., New York City.
Wilcox, Francis O., University of Louisville, Louisville, Ky.
Wild, Payson S., Jr., D 24 Winthrop House, Cambridge, Mass.
Willard, Hiram, Sanford National Bank Bldg., Sanford, Maine.
Williams, Benjamin H., University of Pittsburgh, Pittsburgh, Pa.
Williams, Bryan, 517–520 U. S. National Bank Bldg., Galveston, Texas.
Williams, Curtis C., West Virginia University, Morgantown, W. Va.
Williams, Henry D., 225 Broadway, New York City.
Williams, Ira Jewell, 1005 Morris Bldg., Philadelphia, Pa.
Williams, William, 1 West 54th St., New York City.
Williston, Samuel, Harvard University, Cambridge, Mass.
Willoughby, W. W., 1921 Kalorama Road, N. W., Washington, D. C.
Wilson, Edwin C., Department of State, Washington, D. C.
Wilson, George G., 6 Acacia Street, Cambridge, Mass.
Wilson, Robert R., Duke University, Durham, N. C.
Wirth, Frederick, Jr., Lutzowufer 17, Berlin W. 10, Germany.
Witenberg, J. C., 16, rue François I^{er}, Paris, France.
de Wolf, Francis Colt, 3322 O St., N. W., Washington, D. C.
Wolff, Ernst, Matthäikirchplatz 4, Berlin W 35, Germany.
Wollman, Henry, 20 Broad St., New York City.
Womeldorph, Stuart E., 6626 Piney Branch Rd., N. W., Washington, D. C.
Wong, Charles A., 1510 Liholiho St., Honolulu, Hawaii.
Wood, Judson, Apartado No. 709, Caracas, Venezuela.
Woodall, Emery J., Reconstruction Finance Corporation, Washington, D. C.
Woolsey, Lester H., 710 Jackson Place, Washington, D. C.
Wright, Herbert, Cosmos Club, Washington, D. C.
Wright, J. Butler, c/o Department of State, Washington, D. C.
Wright, Quincy, Faculty Exchange, University of Chicago, Chicago, Ill.
Wriston, Henry M., Lawrence College, Appleton, Wis.
Wunderlich, Georg, 411 West 116th St., New York City.
Wyman, H. L., 3612 Newark St., N. W., Washington, D. C.
Wynne, Cyril, 3410 Newark St., N. W., Washington, D. C.

Yamakawa, Tadao, 5 Oyama-Machi, Shibuya-Ku, Tokyo, Japan.
Yang, Y. C., Soochow University, Soochow, China.
Yin, Pao-yu, 391 Bubbling Well Road, Shanghai, China.
Yoon, Hong Sub, 97 Kan Dong, Seoul, Korea.
Young, C. Walter, 3611 18th St., N. W., Washington, D. C.
Young, Hobart N., 660 Salvatierra St., Stanford University, Calif.
Young, J. Edwin, 700 Jackson Place, Washington, D. C.
Yun, Tchi Y., 104, Ahun-Koog-Dong, Seoul, Korea.
Yung, Kwai, Chinese Legation, Washington, D. C.

Zink, Harold, De Pauw University, Greencastle, Ind.
Zutt, Daniel J., 410 Old National Bldg., Evansville, Ind.

INDEX

[Abbreviations: *Ad*, address; *A.J.I.L.*, American Journal of International Law; *A.S.I.L.*, American Society of International Law; *rem*, remarks.]